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No.

IN THE

Supreme Court of the United States

October Term, 1982

JEREMIAH P. BUCKLEY,
ELLSWORTH B. SARGENT,
WASHINGTON WATER POWER COMPANY,
AND SARGENT - TYEE CONSTRUCTION COMPANY,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a mail fraud indictment which alleges mailing of a public disclosure form in furtherance of a scheme to conceal political contributions allege a "scheme to defraud" under *United States v. Dixon* in the absence of allegation of any corrupt payment?

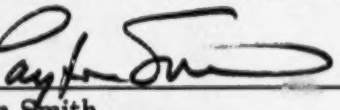
2. Under the criteria of *United States v. Russell*, does a mail fraud indictment adequately inform the defendants of the fraudulent act charged against them when it alleges, by implication only, omission of an unidentified payment to an unknown person for a purpose which is neither alleged nor otherwise disclosed?

3. Under *United States v. Parr*, does a mail fraud indictment based upon nondisclosure of political contributions allege a connection between the mailing of a legally compelled disclosure form and the scheme when it alleges no falsity in the disclosure form?

PARTIES TO THE PROCEEDING

The Indictment reads Sargent-Tyee Construction Company, Inc. The correct name is Sargent-Tyee Construction Company. Sargent-Tyee Construction Company is a predecessor corporation of Tyee Construction Company, now operating as a division of Commonwealth Electric Company, a wholly-owned subsidiary of Commonwealth Companies, Inc., a Delaware Corporation.

DAVIS, WRIGHT, TODD, RIESE & JONES

By 

Payton Smith
Attorneys for Sargent-Tyee
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The Washington Water Power Company, a Washington corporation named as a defendant in the Indictment, has the following subsidiary companies (excluding wholly-owned subsidiaries): The Limestone Company, an Idaho corporation, and Spokane Industrial Park, Inc., a Washington corporation.

LANE POWELL MOSS & MILLER

By _____

Thomas S. Zilly

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IN THE

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JEREMIAH P. BUCKLEY,
ELLSWORTH B. SARGENT,
WASHINGTON WATER POWER COMPANY,
AND SARGENT - TYEE CONSTRUCTION COMPANY,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This petition is filed pursuant to Rule 21 of the Rules of this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to review the judgment of that Court in *United States v. Jeremiah P. Buckley, Ellsworth B. Sargent, Washington Water Power Company and Sargent-Tyee Construction Company, Inc.*, No. 81-1597 (October 8, 1982).

OPINIONS BELOW

The court of appeals entered judgment is this case on October 8, 1982. *United States v. Buckley*, 689 F.2d 893 (9th Cir. 1982). The court of appeals' opinion is attached hereto as Appendix A. On December 28, 1982, the court of appeals denied defendants' Petition for Rehearing (suggested *en banc*). The court of appeals' Order denying rehearing is attached hereto as Appendix B. The trial court's Order, entered August 20, 1981 and granting defendants' motion to dismiss Count I of the Indictment and denying defendants' motion to

dismiss Count II, is attached hereto as Appendix C. A copy of the two-count Indictment is attached hereto as Appendix D. A transcript excerpt from the proceedings of August 16, 1981 before the trial court is attached hereto as Appendix E.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1982. The court of appeals denied defendants' Petition for Rehearing (suggested *en banc*) on December 28, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Wash. Rev. Code § 42.17.170:

(1) Any lobbyist registered under RCW 42.17.150 and any person who lobbies shall file with the commission periodic reports of his activities signed by the lobbyist. The reports shall be made in the form and manner prescribed by the commission. They shall be due monthly and shall be filed within fifteen days after the last day of the calendar month covered by the report.

(2) Each such monthly periodic report shall contain:

* * *

(c) An itemized listing of each such expenditure in the nature of a contribution of money or of tangible or intangible personal property to any candidate, elected official, or officer or employee of any agency, or any political committee supporting or opposing any ballot proposition, or for or on behalf of any candidate, elected official, or officer or employee of any agency, or any political committee supporting or opposing any ballot proposition. All contributions made to, or for the benefit of, any candidate, elected official, or officer or employee of any agency, or any political committee supporting or opposing any ballot proposition shall be identified by date, amount, and the name of the candidate, elected official, or officer or employee of any agency, or any political committee supporting or opposing any ballot proposition receiving, or to be benefited by each such contribution.

Wash. Rev. Code § 42.17.180:

Every employer of a lobbyist registered under this chapter during the preceding calendar year shall file with the commission on or before March 31st of each year a statement disclosing for the preceding calendar year the following information:

(1) The name of each state elected official and the name of each candidate for state office who was elected to such office and any member of the immediate family of such persons to whom such employer has paid any compensation in the amount of five hundred dollars or more during the preceding calendar year for personal employment or professional services, including professional services rendered by a corporation, partnership, joint venture, association, union, or other entity in which such person holds any office, directorship, or any general partnership interest, or an ownership interest of ten percent or more, the value of such compensation in accordance with the reporting provisions set out in RCW 42.17.240(2), as now or hereafter amended, and the consideration given or performed in exchange for such compensation.

(2) The name of each state elected official, successful candidate for state office or members of his immediate family to whom the lobbyist employer made expenditures directly or indirectly, either through a lobbyist or otherwise, the amount of such expenditures and the purpose for such expenditures: *Provided*, That for the purposes of this subsection, the term expenditure shall not include any expenditure made by the employer in the ordinary course of business if such expenditure is not made for the purpose of influencing, honoring, or benefiting such elected official, successful candidate or member of his immediate family, as an elected official or candidate.

(3) The total expenditures made by the employer for lobbying purposes, whether through or on behalf of a registered lobbyist or otherwise.

(4) All contributions made to a candidate for state office, to a political committee supporting or opposing a candidate for state office, or to a political committee suporting or opposing a state-wide ballot proposition. Such contributions shall be identified by the name and the address of the recipient and the aggregate amount contributed to each such recipient.

(5) The name and address of each registered lobbyist employed by such employer.

(6) Such other information as the commission shall by rule prescribe.

STATEMENT OF THE CASE

In January 1981, the grand jury indicted petitioners on one count of mail fraud in violation of 18 U.S.C. § 1341, alleging a money-washing scheme for political contributions that operated from 1972 to 1976, in part to deprive the public of its "right to know" under a state law requiring disclosure of contributions to state legislators. As of February 1974, Washington state law required that both lobbyists and their employers report lobbying expenditures. Wash. Rev. Code §§ 42.17.170-.180 (1981).

The Indictment alleged that Buckley distributed $15,000 to unknown state legislators on behalf of his employer, Washington Water Power Company ("WWPC"), at unknown times after receiving it in early June 1975, and that he filed Form L-3 reports from January 1973 to January 1976 with the Washington Public Disclosure Commission in which he intentionally failed to disclose the moneys paid to him in accordance with the scheme and subsequently distributed by him to members of the Washington State Legislature on behalf of WWPC. The only allegation of use of the mails in furtherance of the alleged fraudulent scheme within the applicable statute of limitations is contained in the 28th and final paragraph of Count I of the Indictment:

> On or about April 1, 1976, within the Western District of Washington, JEREMIAH P. BUCKLEY, ELLSWORTH B. SARGENT, WASHINGTON WATER POWER COMPANY, and SARGENT-TYEE CONSTRUCTION COMPANY, the defendants herein, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, knowingly caused to be delivered by mail, according to the direction thereon, an envelope addressed to the "Public Disclosure Commission, 403 Evergreen Plaza, 711 Capitol Way, Olympia, Washington 98504" containing Public Disclosure Commission Form L-3, Lobbyist Employer's Report, for the year 1975, from WASHINGTON WATER POWER COMPANY.

Deprivation of the public's "right to know" by use of the mails pursuant to the alleged scheme could only have occurred if the 1976 L-3 form was false, and the Government has so conceded. 689 F.2d at 898. This 1976 Form L-3 called for disclosure of contributions made during the year 1975. The Indictment alleges that it was mailed "for the purpose of executing" the scheme, but the Indictment does not allege that this 1976 Form L-3 was false. (Appendix D, Indictment ¶ 28.) Nor did the Government state in what respect it is contended the L-3 was false when directed to do so in a Bill of Particulars. (Appendix E-42-47.) In fact, Government

counsel candidly admitted in oral argument before the district court that the Government cannot do so. (Appendix E-46.)[1]

There is no allegation or implication in the Indictment that any money was distributed in 1975 and thus required to be reported in the 1976 Form L-3 report. It is no surprise, therefore, that the Indictment pointedly omitted any allegation that the 1976 filing was false.

The Indictment does not allege any improper payment or any fact constituting fraud or undue influence. It tells the defendants nothing about any undisclosed payment: to whom it was made, when or for what allegedly corrupt purpose. Even if the Indictment alleges by implication that some undisclosed payment was made, it tells the defendants nothing which would enable them to show propriety in the payment, because the payment is not and cannot be identified.

The district court granted in part petitioners' motion for a Bill of Particulars, including a request for further information about paragraph 28 of the Indictment. Specifically, the Government was directed to state:

> which payments or expenditures, if any, were omitted from the Form L-3 for the year 1975, and by identifying any other statements contained in said form which it has contended were untrue, and the respect in which it was contended they were untrue and by stating whether it is contended that any required information was omitted from said report and, if so, by identifying all such information.

---

1. In contrast, the Indictment alleges that other, earlier filings (not within the statute of limitations) were also made in furtherance of the scheme. (Appendix D, Indictment ¶¶ 26, 27 and 28.) Unlike the allegations of paragraph 28 concerning the 1976 L-3, it is alleged that each prior form "intentionally failed to disclose" contributions. These allegations concerning the pre-1976 filings, however, are based upon clear errors of fact and law in the Indictment. The allegations of payments prior to 1975 are completely consistent with distribution of such sums at times when no disclosure law was in effect. *See* Washington Water Power Company's Memorandum in Support of Defendants' Motion to Dismiss Indictment. The Government has never contested this point.

(Appendix E-43.) The Government then provided the following information relevant to paragraph 28:

> The L-3 filed by Washington Water Power Corporation for the year 1975 failed to report any of the money received from Robert A. Perry and spent on behalf of Washington Water Power Corporation by Jeremiah Buckley.

(Appendix E-45.)

Petitioners then moved for dismissal of the mail fraud count. The district court granted the motion on two grounds. First, taking all allegations of the Indictment and Bill of Particulars as well as those made in open court by the Government as true, without an explicit allegation that Buckley made payments to legislators in 1975 and intentionally omitted them from the 1976 Form L-3, the court concluded that the Indictment failed to allege any facts implying that the Form L-3 was false, and thus mailed for the purpose of executing the alleged scheme to defraud. (Appendix C, Order ¶ 1(e).)

Although the Indictment recites the language of the mail fraud statute in alleging that the 1976 Form L-3 was "for the purpose of executing" a fraudulent scheme, the district court held it deficient in that it failed to inform the defendants of the essential facts of this fraud charge: the nature of the alleged fraud which inhered in the alleged payments and the alleged connection between the 1976 mailing and the fraud. (*Id.*) Since the Government is unable to state to whom, when or for what purpose any payment was made, or which such payments were omitted from the form, the Government is unable to inform the defendants of the nature of the fraud with which they are charged, and defendants are unable to gather evidence showing the non-fraudulent character of any payment because none is identified. (*Id.*)

The court of appeals reversed, distinguishing the decision in *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976) (Friendly, J.) and held that "the Government made barely sufficient allegations in this mail fraud indictment," 689 F.2d at 900, of "a 'scheme to defraud' Washington citizens of their statutory right to know who made what political payments

to whom, and a knowing use of the mails to further the scheme in violation of the mail fraud statute," 689 F.2d at 898, despite the facts that "the Government conceded that it could not prove the omission in the 1976 Lobbyist Report of any specific payment to any specific legislator in 1975 and that the Government refused to make such specific allegations in the bill of particulars." 689 F.2d at 899. Agreeing "with the district court's preliminary assessment of the weakness of the Government's case," 689 F.2d at 900, the court concluded that "[a]lthough the Government's theory appears weak, and a judgment of acquittal may be granted if the Government presents inadequate evidence at trial, the weakness of the Government's case is irrelevant to the sufficiency of the indictment." *Id.*

As a result, the court agreed with the Government that though " 'the only way [the disclosure form] could be in execution or furtherance [of a scheme to defraud] is if it were false,' " the Indictment "need not explicitly state that WWPC filed a false form by failing to report the 1975 payments to legislators because it *implied* that fact when it alleged a money laundering scheme in 1975, payments to legislators as a result of that scheme, and the mailing of a Lobbyist Employer's Report for the year 1975 in furtherance of the scheme." 689 F.2d at 898 (emphasis added). "Thus, the defendants had sufficient notice of the charged crime to prepare a defense and plead double jeopardy despite the fact that the indictment was lengthy, confusing, and largely irrelevant." 689 F.2d at 899 (footnote omitted). Distinguishing *Parr v. United States*, 363 U.S. 370 (1960), the court held legally sufficient the allegation that the mailing was made in furtherance of a scheme to defraud despite the fact it was "legally compelled." Finally, the court found unpersuasive the defendants' plea that they could not defend against a fraud charge when none of the particulars of the fraud were alleged: who was paid, when and for what alleged "fraudulent" purpose.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Decisions of Other Courts of Appeal Concerning the Reach of the Mail Fraud Statute.

The court of appeals' decision demonstrates the potentially limitless reach of the mail fraud statute when its plain words are stretched beyond normal bounds by imaginative Government prosecutors. It also is in direct conflict with the Second Circuit's decision in *United States v. Dixon*. The indictment here alleges a scheme not to disclose political contributions as required by a state disclosure law. In *Dixon*, the indictment alleged a scheme not to disclose loans to a corporate officer in violation of a federal disclosure statute, Section 14 of the Securities Exchange Act of 1934, 15 U.S.C. § 78n.

There, the defendant corporate president allegedly had distributed false proxy statements and made false filings with the SEC, both concealing corporate loans to him, and had then used the mails to obtain proxies. Fraud does not inhere in loans to corporate officers. Nor is it inherent in political contributions. In *Dixon* and in this case, the sole vice alleged was nondisclosure. Judge Friendly, speaking for the Second Circuit, held that nondisclosure in *Dixon* of otherwise proper corporate loans was not a "scheme or artifice to defraud" within the purview of the mail fraud statute.

> When all is said and done, the Government's proof on the mail fraud counts was simply that Dixon had caused the mails to be used to receive proxies solicited by a proxy statement which did not contain the information about loans to Dixon that it should have contained. To hold that this alone constituted a violation of the mail fraud statutes would stretch its words beyond normal bounds; "ambiguity concerning the ambit of criminal statutes should be resolved in favor of leniety," *Rewis v. United States*, 401 U.S. 808, 812, 91 S. Ct. 1056, 1059, 28 L. Ed. 2d 493, 497 (1971), quoted and applied in *United States v. Bass*, 404 U.S. 336, 347-49, 92 S. Ct. 515, 522-523, 30 L. Ed. 2d 488, 496-497 (1971).

536 F.2d at 1401.

The *facts* alleged in this Indictment afford no basis for distinguishing it from *Dixon*. The court of appeals attempted to do so as follows:

> In *Dixon*, the court held that nondisclosure by a corporate official of certain loans in violation of SEC regulations was not a scheme to defraud because the shareholders did not rely on the disclosure regulations, and the nondisclosure was not intended to secure money or property in a fraudulent manner. *Id.* at 1398-1400. In contrast, the Government alleges that the defendants here did not disclose all of their contributions to state legislators in violation of a state statute for the purpose of hiding *contributions that were intended to influence the officials improperly.*

689 F.2d at 897 (emphasis added).

The key language underlined above does not accurately describe the Indictment in this case. The only *fact* alleged which even implies impropriety is the allegation of nondisclosure. That, under *Dixon*, is not enough to constitute a "scheme or artifice to defraud." There is no allegation of any payment constituting bribery, corruption or improper influence — and for good reason since the Government has admitted in three places in the Indictment (Appendix D, Indictment ¶ 23(a), (b) and (c)) and in open court (Appendix E-45-46) that it cannot prove any specific payment by anyone to any legislator for any purpose.

The Indictment does allege in a conclusory way that the *purpose* of the "scheme" was improper influence, but no *facts* are alleged to support that charge:

> 1. Beginning at some point prior to April 1972 and continuing thereafter until October 1977, in the Western District of Washington and elsewhere, JEREMIAH P. BUCKLEY, ELLSWORTH B. SARGENT, WASHINGTON WATER POWER COMPANY and SARGENT-TYEE CONSTRUCTION COMPANY, the defendants herein, and Robert A. Perry devised and intended to devise a scheme and artifice:
>
> (a) to defraud the citizens of the State of Washington of their right to the conscientious, loyal, faithful, disinterested, and unbiased services, actions, and performance of official duties by members of the

Washington State Legislature openly and honestly, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud;

(b) to defraud the citizens of the State of Washington of their right to have the State's electoral processes conducted openly and honestly free from corruption, bias, dishonesty, deceit, official misconduct, and fraud and in accordance with the laws of the State of Washington;

(c) to defraud the citizens of the State of Washington of their right to know of any benefits, financial or otherwise, conferred upon members of the Washington State Legislature by WASHINGTON WATER POWER COMPANY and JEREMIAH P. BUCKLEY as lobbyist for WASHINGTON WATER POWER COMPANY.

Following these allegations, this Court may search the remainder of the Indictment in vain for any alleged act of "corruption, bias, dishonesty, deceit, official misconduct and fraud," or any allegation of a single payment made for an "improper" purpose. The Indictment simply alleges payments by Buckley were made "for the purpose of furthering the legislative interests of WASHINGTON WATER POWER COMPANY." (Appendix D, Indictment ¶¶ 2, 12(a) and (b).) All political contributions are presumably made for such purposes, and do not constitute "improper influence."

The Government may hold the view that political contributions "corrupt" legislators, but there is no allegation of corruption here; in fact, the Indictment admits that there will be no *evidence* of it by conceding that the persons who allegedly received such payments were "unknown to the Grand Jury." (Appendix D, Indictment ¶ 23(a), (b) and (c).) Neither does making political contributions rise to the level of a fraudulent scheme that, using the words of the court below, "fail[s] to measure up to the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" 689 F.2d at 897, *quoting United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980).

In *Bohonus*, the court of appeals concluded that "depriving an employer of one's honest services and of its right to have its business conducted honestly can constitute a 'scheme to

defraud' under § 1341." 628 F.2d at 1172; *see also United States v. Louderman*, 576 F.2d 1383, 1387-88 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978) (scheme to gather private information by deception held fraudulent). "In light of *Bohonus* and *Louderman*," the court below held that the "Government adequately alleged a 'scheme to defraud' Washington citizens of their statutory right to know who made what political payments to whom, and a knowing use of the mails to further the scheme in violation of the mail fraud statute." 689 F.2d at 898. This reasoning, however, was considered and expressly rejected by Judge Friendly in *Dixon*.

> We likewise reject the argument that impairment of the stockholders' opportunity to exercise a full and fair judgment by Dixon's § 14 violation deprived them of his "honest and faithful services," see *United States v. Isaacs*, 493 F.2d 1124 (7 Cir.), *cert. denied*, 417 U.S. 976, 94 S. Ct. 3184, 41 L. Ed. 2d 1146, *reh. denied*, 418 U.S. 955, 94 S. Ct. 3234, 41 L. Ed. 2d 1178 (1974), in the sense required to constitute a violation of the mail fraud statute. This doctrine of the deprivation of honest and faithful services has developed to fit the situation in which a public official avails himself of his public position to enhance his private advantage, often by taking bribes. Such actions may not deplete the fisc; indeed, as in *Isaacs* they may have enriched it, but they are nonetheless frauds since the public official has been paid to act in breach of his duties. Thus the doctrine has been applied to the corruption of a public official with respect to the allocation of insurance commissions although these must, in any case, have been paid by the state to someone, *United States v. Barrett*, 505 F.2d 1091, 1103-05 (7 Cir. 1974), *cert. denied*, 421 U.S. 964, 95 S. Ct. 1951, 44 L. Ed. 2d 450 (1975). See also the cases under the portion of the general conspiracy statute, 18 U.S.C. § 371, which makes it a crime to conspire "to defraud the United States, or any agency thereof in any manner or for any purpose . . . ." *Haas v. Henkel*, 216 U.S. 462, 30 S. Ct. 249, 54 L. Ed. 569 (1910); *Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S. Ct. 511, 512, 68 L. Ed. 968, 970 (1924); *United States v. Johnson*, 383 U.S. 169, 172, 86 S. Ct. 749, 751, 15 L. Ed. 2d 681, 683 (1966); *Miller v. United States*, 24 F.2d 353, 358-59 (2 Cir.), *cert. denied*, 276 U.S. 638, 48 S. Ct. 421, 72 L. Ed. 745 (1928); *United States v. Peltz, supra*, 433 F.2d at 51-52. *All these cases, however, involved an*

> *element of corruption not present here.* We therefore need not consider whether the doctrine of the cited cases should be carried over into the private field, e.g., if, for example, Dixon had bribed Entwistle to put out a proxy statement known to be incomplete.

536 F.2d at 1400 (emphasis added).

Since this Indictment contains no factual allegation of bribery, corruption, bias, dishonesty, deceit, official misconduct, fraud or improper purpose, the decision of the court below conflicts with *Dixon*. In short, the political contributions alleged to have been made here and not disclosed were *not* fraudulent or corrupt within the meaning of the mail fraud statute. Nondisclosure of such contributions, if made in 1975, would violate Washington state law, but it is *not mail fraud* any more than nondisclosure of otherwise legitimate loans in violation of federal law was fraud in the *Dixon* case.

II. The Decision Below Raises Significant Questions Concerning the Application of this Court's Holdings in *United States v. Russell* and in *Parr v. United States*.

A. *Russell*

The Government has conceded that the "only way [the 1976 L-3 disclosure form] could be in execution or furtherance [of a scheme to defraud] is if it were false." 689 F.2d at 898. It is undisputed that the Indictment on its face does not allege any such falsity, nor does it apprise the defendants of the alleged fraudulent or corrupt elements of any allegedly undisclosed payment. Nonetheless, the Government contends that it was sufficient to allege only, using the words of the mail fraud statute, that the mailing of the 1976 L-3 report was "for the purpose of executing" a scheme which the Indictment labels fraudulent without any particularization of the basis for that label. The court below agreed, holding that the "barely sufficient allegations in this mail fraud indictment," 689 F.2d at 900, "*implicitly* alleged the falsity of the [1976] disclosure report . . . [and thus were] clear enough to give the defendants notice of the crime charged and to allow them to plead double jeopardy." 689 F.2d at 898 (emphasis added). This statement, even if true as far as it

goes, ignores the failure to allege the elements of the *fraud*: who was paid, for what corrupt purpose, with what sum of money and when.

In *Russell v. United States*, 369 U.S. 749 (1962), this Court held fatally defective indictments that charged an offense using only the general language of the underlying criminal statute. In that case, the defendants were indicted for violating 2 U.S.C. § 192, which makes it a criminal offense for a witness before a congressional committee to refuse to answer any question "pertinent to the question under inquiry" by the committee. Because the indictments simply charged that the questions the witnesses refused to answer "were pertinent to the question then under inquiry" without setting forth facts showing what the subject of the inquiry was, which was "the very core of criminality under" the statute, they failed " 'to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.' " 369 U.S. at 768, *quoting United States v. Cruikshank*, 92 U.S. 542, 558 (1876).

Although the *Russell* Court concluded that the language of the underlying statute may be used in the general description of an offence, " 'it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.' " 369 U.S. at 765, *quoting United States v. Hess*, 124 U.S. 483, 487 (1888). This the indictments in *Russell* failed to do. "The vice of these indictments, rather, is that they failed to satisfy the first essential criterion by which the sufficiency of an indictment is to be tested, i.e., that they failed to sufficiently apprise the defendant 'of what he must be prepared to meet.' " 369 U.S. at 764; *accord, United States v. Nance*, 533 F.2d 699 (D.C. Cir. 1976) (wire fraud indictment using statutory language to allege that "false representations" were made held fatally defective for failing to allege any of the factual particulars thereof); *United States v. Curtis*, 506 F.2d 985 (10th Cir. 1974) (mail fraud indictment held fatally defective because it failed to inform defendant as to what aspects of the alleged scheme were contended to be fraudulent).

The very core of criminality in the case at bar is the *omission* from the 1976 L-3 report of *a corrupt payment: e.g.*, a bribe. The Indictment alleges neither the omission nor the facts making any omitted payment *corrupt*. Although the court below found that the Indictment alleged omission of some payment by implication, *it clearly does not allege in what way that omission was part of a fraudulent scheme*. A political contribution, like the loan in *Dixon*, is not inherently corrupting and mere nondisclosure of it is not fraud. In *Dixon* the Indictment at least identified the loan. Here the Government has, *arguendo*, implied some unidentified payment was made but has utterly failed to inform the defendants how the unidentified payment formed any part of a scheme of undue influence or fraud.

To find by implication or otherwise that this Indictment alleges the defendants "corrupted" legislators or exerted "improper influence," this Court must rely solely upon the general allegations of the purposes of the alleged scheme of nondisclosure in paragraphs 1(a)-(c) (set forth above). But those resounding generalities tell the defendants nothing about the nature of the corrupt acts that are the core of any fraud charge. Once it is conceded that "corruption" or "improper influence" is a necessary element of the alleged scheme of nondisclosure here, it follows as a fundamental principle of due process that the defendants are entitled to know the *facts* constituting the improper influence or corruption in order to prepare a defense.

Questions which are unanswered by this Indictment are: Who was influenced? How were they influenced? By what payment were they influenced? What was improper about the influence? Did a legislator agree to vote a certain way for money? What witnesses should defendants interview to defend this allegation? Which legislators should it call to testify in their defense? How are the defendants to show a payment was for a proper purpose when they are not advised of *any payment* they are alleged to have made or, of *any improper purpose* for which they are alleged to have made it?

In its opinion, the court below discussed the failure to allege any specific payment in 1975 solely in connection with the question whether the Indictment alleged falsity in the 1976 L-3 report and thus connected the filing with the alleged scheme. The court found the Indictment alleged a payment in 1975 *by implication*. But the Indictment must allege a payment made in 1975 for the purpose of improperly influencing a legislator in order to allege fraud.

More importantly, it must allege sufficient facts about that payment and its allegedly improper aspects to permit defendants to gather the evidence relating to that claim in order to defend against it. Alleging "by implication" a payment of an unknown amount at an unknown time to an unknown person for an undisclosed objective hardly meets the test for pleading fraud; nor is this inadequacy cured by the shadow of vague "improper purposes" cast over the Indictment in paragraphs 1(a)-(c).

Compare the allegations confronting the defendants here with those in *United States u McNeive*, 536 F.2d 1245 (8th Cir. 1976). In that case, a mail fraud conviction was reversed because, although it was alleged and proved that a public official received gratuities by mail, in the absence of evidence that they accorded preferential treatment to the payors, there was no scheme to defraud, *i.e.*, the payments were not shown to be bribes. The *defense* in *McNeive* was able to show a *lack of influence*. Defendants cannot do so here because they are not told whom they are supposed to have paid, when, or for what.

The gravamen of a mail fraud indictment is fraud. The reported cases are replete with indictments describing bribes, kickbacks, corruption, and influence-peddling. This Indictment and the *McNeive* indictment are unique in the complete omission of any facts constituting corruption. The gravamen of this Indictment is nondisclosure. But nondisclosure of political contributions is not a mail fraud violation.

The *McNeive* court distinguished several other leading mail fraud cases on grounds showing how vital it is to the defense of such a charge to be apprised of the specific fraudulent act complained of. The following excerpts from the opinion show

how the presence or absence of the elements of fraud depend upon circumstances surrounding specific payments or efforts to influence:

> The first category, which comprises the bulk of the mail fraud cases, includes the many deceptive schemes which are intended to defraud individuals of money or other tangible property interests. There can be little dispute that these schemes are within the scope of § 1341 since they involve calculated efforts to use misrepresentations or other deceptive practices to induce the innocent or unwary to give up some tangible interest.
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> * * *
>
> The second category of § 1341 deceptive schemes is comprised of those which operate to deprive individuals of intangible rights or interests. In *United States v. States*, 488 F.2d 761, 765 (8th Cir. 1973), *cert. denied*, 417 U.S. 909, 94 S. Ct. 2605, 41 L. Ed. 2d 212 (1974), this court ruled that a vote fraud scheme was a proper subject for a mail fraud prosecution since the scheme defrauded citizens of "certain intangible political and civil rights."
>
> * * *
>
> An increasing number of courts have expanded the rationale of *United States v. States, supra*, and related cases beyond the arena of political and civil rights. These courts have held that a recreant employee can be prosecuted under § 1341 if he breaches his allegiance to his employer *by accepting bribes or kickbacks* in the course of his employment, since such conduct defrauds the employer of his right to the employee's honest and faithful services. *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975), *cert. denied*, ____U.S.____, 96 S. Ct. 2237, 48 L. Ed. 2d 837, 44 U.S.L.W. 3685 (1976). Similar schemes devised by public officials have been viewed as defrauding state or municipal citizens of the same intangible right. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976, 94 S. Ct. 3184, 41 L. Ed. 2d 1146 (1974).
>
> * * *
>
> In support of its position, the Government relies primarily upon the Seventh Circuit cases of *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977, 96 S. Ct. 1484, 47 L. Ed. 2d 748, 44 U.S.L.W. 3532 (1976); *United States v. Keane*, 522 F.2d 534 (7th

Cir. 1975), *cert. denied*, 424 U.S. 976, 96 S. Ct. 1481, 47 L. Ed. 2d 746, 44 U.S.L.W. 3532 (1976); *United States v. Isaacs, supra*, and *United States v. George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827, 94 S. Ct. 155, 38 L. Ed. 2d 61 (1973). In each of these cases, the court found that either an employee or public official had breached his duty to provide faithful and honest services and that this breach contributed to the court's finding of a § 1341 scheme to defraud. *These opinions contain broad statements which the Government cites as supportive of its position in the present case. However, these general statements, standing alone, are not necessarily controlling* . . . .

* * *

United States v. George, supra, is a kickback case. It involved a defendant who permitted his *personal financial interests* to interfere with his duty to secure the most favorable bargain for his employer.

* * *

United States v. Keane, supra, is also distinguishable. In that case, Keane, a city alderman, participated in a complicated and clandestine scheme to *purchase, through a newly-established investment company, tax delinquent property from county-sponsored scavenger sales.* Keane used his position as chairman of the City Finance Committee to *secure preferential treatment* for the properties in which he maintained a nondisclosed interest and voted on certain matters affecting his property, failing to disclose his interest to other aldermen.

* * *

The activities described in *Keane* cannot be deemed analogous to McNeive's conduct. Keane permitted his personal interest to distort his discretion and to adversely affect the legislative functions of the City Council. *McNeive's scheme did not interfere at all with any of his discretionary functions* since the issuance of the permits was only a ministerial duty.

* * *

The Government's reliance upon *United States v. Isaacs, supra*, and other bribery cases is likewise misplaced. *The receipt of bribes by a public official to induce him to grant special favors* and preferential treatment upon the donor clearly constitutes a breach of that official's duty to perform loyally and honestly. McNeive's conduct in

this case, however, does not fit within that mold. The Government does not, and could not, characterize the tips received by McNeive as disguised bribes. Furthermore, the *tips did not affect McNeive's discretionary judgment* nor result in any official preferential treatment being accorded Preston. McNeive's practice, compared with the egregious bribery scheme in *Isaacs*, is relatively innocuous, and petty to the extent that there is no actual intent to defraud, which is an essential element of the mail fraud statute.

The case of *United States v. Bush, supra*, is likewise not on point. In that case, a public official *concealed his interest in an advertising agency and used his official influence to induce the City to issue an advertising contract to his agency*. The court, drawing an analogy to kickback cases such as *George*, correctly concluded that defendant's conduct *deprived the City of the opportunity of securing the most economically favorable contract*. As previously stated, this constituent is absent in the present case.

* * *

Based upon the language and underlying policy of § 1341, we concluded that McNeive's conduct is beyond the pale of that statute. We simply do not believe that Congress, by enacting the mail fraud statute, contemplated that a situation similar to McNeive's would be classified as a scheme to defraud. *The acceptance of small unsolicited gratuities or tips is not a bribe, kickback, an extortion or a "scheme or artifice to defraud"* under the facts of this case.

536 F.2d at 1248-51 (emphasis added) (footnotes omitted).

In the present case, the defendants cannot compare the amount of any contribution alleged with the "small, unsolicited gratuities" in *McNeive*, or show a lack of influence on the alleged recipient's vote as in *McNeive*, or distinguish a payment from the blatant bribery in *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974), or from the kickbacks in *United States v. George*, 477 F.2d 508 (7th Cir. 1973) — because nothing is alleged that identifies any payment, its purpose, its recipient or the surrounding circumstances. And the Government admittedly cannot now and never will be able to supply such facts. (Appendix E-45-46.)

The defendants are not supplied with the gravamen of this offense: the nature of the alleged fraud. Nondisclosure of some payment in 1975 is alleged (according to the circuit court), by implication. The "improper influence" the court found present in the Indictment is there only by innuendo, yet that must be the essence of the charge. The Indictment falls squarely within the holding in *Russell*:

> Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.
>
> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, — it must descend to particulars.' " *United States v. Cruikshank*, 92 U.S. 542, 558, 23 L. Ed. 588, 593.
>
> * * *
>
> The vice which inheres in the failure of an indictment under 2 U.S.C. § 192 to identify the subject under inquiry is thus the violation of the basic principle "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, . . ." *United States v. Simmons, supra* (96 U.S. at 362). A cryptic form of indictment in cases of this kind *requires the defendant to go to trial with the chief issue undefined.* It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. *It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.*

369 U.S. at 764-66 (emphasis added).

Even without considering the weakness of the Government's circumstantial evidence that *some* payment *must* have been made in 1975, it is clear from the Indictment that the Government, without having presented any evidence to the grand jury that payments were made to legislators in 1975 and not disclosed in the 1976 L-3 form, wants a petit jury to speculate about two essential elements of this offense: (1) that a payment was made by Buckley at all in 1975; and (2) that it was made for a "corrupt" purpose. The Government

remains free to sift through its evidence and to select any purpose it feels it can support in closing argument, unhindered by any description in the Indictment limiting the purpose in any way. We concede that defendants are not entitled to the Government's evidence in an indictment. But this Indictment omits the gravamen of the fraud charge — the facts constituting the claimed improper influence or corruption — in violation of the principles announced by this Court in *Russell*.

B. *Parr*

This Court has carefully differentiated between those mailings that could be part of a "fraudulent scheme" (and that would therefore support a mail fraud indictment) and those that could not have been done "for the purpose of executing" such a scheme. In *Parr v. United States*, 363 U.S. 370 (1960), the defendant and his associates controlled the affairs of a school district in Texas. Parr's co-defendants were members of the school board and he was the president of the bank in which the school district funds were deposited. He and his associates devised a scheme to defraud the district of large sums of money.

The actual defalcations did not involve any use of the mails. The school board was required by Texas law to mail out certain documents and notices to taxpayers and taxpayers in return sent their tax payments using the mails. The monies belonging to the district that had arrived by mail were later converted by the defendants to their own use. Because the mailings at issue were "legally compelled," this Court held that they were not done "for the purpose of executing" the fraudulent scheme.

> We agree that the factual situation is unique, and, of course, agree, too, that the fact there is no reported decision involving similar factual circumstances or legal theories is not determinative. But in the light of the particular circumstances of this case, and especially of the facts (1) that the School Board was legally required to assess and collect taxes, (2) that the indictment did not charge nor the proofs show that the taxes assessed and collected were in excess of the District's needs or that they were "padded" in any way unlawful, (3) that

> no such issue was submitted to, nor, hence, determined by, the jury, (4) that the Board was compelled to collect and receipt for the taxes by state law, which, in the circumstances here, compelled it to use and *cause* (here, principally by permitting) the use of the mails for those purposes, we *must conclude that the legally compelled mailings, complained of in the first 16 counts of the indictment, were not shown to have been unlawful "step[s] in a plot," Badders v. United States, supra* (240 U.S., at 394), *"part[s] of the execution of the fraud," Kann v. United States, supra* (323 U.S., at 95), *"incident to an essential part of the scheme," Pereira v. United States, supra* (347 U.S., at 8) *or to have been made "for the purpose of executing such scheme,"* within the meaning of § 1341, for we think it cannot be said that *mailings made or caused to be made under the imperative command of duty imposed by state law* are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing for the District plan to steal, when or after received, some indefinite part of its moneys.

363 U.S. at 391 (emphasis added); *accord United States v. Boyd*, 606 F.2d 792 (8th Cir. 1979) (defendant's "legally compelled" mailing of income tax payments comprised in part of monies obtained from his lawful activities held not sufficient to sustain mail fraud conviction).

In *Kann v. United States*, 323 U.S. 88 (1945), defendants were charged in a mail fraud indictment with conceiving a scheme to defraud a corporation and its shareholders by diverting to themselves profits from government contracts held by the corporation. The alleged scheme contemplated distribution of the profits in question to a subsidiary corporation (Elk Mills), which would in turn pay large salaries and bonuses to defendants. The indictment alleged that the defendants, by cashing a check at a bank, had caused that check to be transmitted by mail from that bank to the bank on which it was drawn. Reversing defendants' convictions, the Court held that this mailing was collateral to the scheme and not a part of it.

> [T]he scheme was completely executed as respects the transactions in question when the defendants received the money intended to be obtained by their fraud, and

> the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it.
>
> We hold, therefore, that one element of the offense defined by the statute, namely, that the mailing must be for the purpose of executing the fraud, is lacking in the present case. The judgment must be reversed.

323 U.S. at 95.

In this case, *Parr* mandates that the "legally compelled" mailing of the 1976 L-3 cannot be alleged to have been part of any mail fraud "scheme" in the absence of any allegation that it omitted reference to specific payments to legislators. Likewise, in the absence of any allegation that the 1976 L-3 failed to report payments to specific legislators, *Kann* holds that it too must be considered as only "incidental and collateral to the scheme" and "not a part of it." The court below was unable to distinguish *Parr* in any meaningful way.

> *Parr* involved a situation where the legally compelled mailing was not made in furtherance of a scheme to defraud. In this case the Government alleges that the false mailing of the 1976 disclosure form was in furtherance of the scheme to make secret payments to legislators.

689 F.2d at 900.

The Court of Appeals could not meaningfully distinguish *Parr* because the Indictment there, like here, alleged that the "legally compelled" mailings were made "for the purpose of executing the scheme." Moreover, in both cases there was no allegation or evidence that the mailings — tax collections in *Parr* and the 1976 L-3 here — were unlawful or false. The Government has sought to distinguish the holding in *Parr* by arguing that the Texas School directors who were defendants in *Parr* were required by law to "issue statements and deliver receipts upon collection." It argued that neither Washington Water Power nor Jeremiah P. Buckley were legally obligated to "engage in lobbying" and sought to distinguish *Parr* on that ground. This argument is without substance.

Texas law did not require that the defendants in *Parr* run for election to the School Board. It required that tax

statements be delivered. The significant point in *Parr* was that the directors (once having assumed that position) were compelled by law to deliver certain statements to taxpayers and they used the mails for that purpose. So here, once Mr. Buckley was assigned by his employer to the legislature as a lobbyist, he too was compelled by law to file lobbyist registration statements with the Public Disclosure Commission. He used the mails to make a "legally compelled" filing.

The point that *Parr* makes which the Government and court below ignored is that, where mailings are legally compelled, courts will hesitate to find that they were "steps in a plot," "parts of the execution of the fraud," or "incident to an essential part of the scheme." *Parr* teaches that, in the absence of factual allegations showing the falsity of the legally compelled mailing relied on by the Government here to support its entire case, the Court of Appeals could not conclude that that legally compelled mailing was made "for the purpose of executing such scheme." Its decision therefore is in direct conflict with *Parr*.

CONCLUSION

This Indictment alleges no facts showing the connection between the mailing and a scheme of nondisclosure because it omits any allegation that the mailing was false. If the Indictment can be said to imply such falsity, that implication does not afford any basis for distinguishing the implied political contribution from the undisclosed loan in *Dixon*. Nor does an allegation, by implication only, of an unidentified political contribution made for an unknown purpose to an unknown person apprise the defendants of the allegedly corrupt elements in the payment, which, under *Dixon*, must be present for there to be a fraudulent scheme. The defendants cannot establish the legitimacy of a payment which the Indictment does not identify.

DATED this 26th day of February, 1983.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,

Plaintiff-Appellant,

v.

Jeremiah P. BUCKLEY, Ellsworth B. Sargent, Washington Water Power Co., and Sargent-Tyee Construction Co., Defendants-Appellees.

No. 81-1597.

United States Court of Appeals,

Ninth Circuit.

Appeal from the United States District Court for the Western District of Washington

Donald S. Voorhees,

District Judge, Presiding

Argued and submitted April 6, 1982.

Decided Oct. 8, 1982.

Michael P. Ruark, Asst. U.S. Atty., Seattle, Wash., for plaintiff-appellant.

Arthur Harrigan, Seattle, Wash., argued, for defendants-appellees; W. A.

Helsell, Seattle, Wash., G. W. Akers, Payton Smith, Seattle, Wash., on brief.

Before KILKENNY, HUG, and SKOPIL, Circuit Judges.

SKOPIL, Circuit Judge:

The Government appeals the dismissal of an indictment of one count of mail fraud in violation of 18 U.S.C. § 1341. The district court dismissed the indictment on the ground that the Government had not alleged, or shown that it could prove, that a lobbyist disclosure form, mailed by appellee Washington Water Power Company ("WWPC"), contained false information. Because the indictment provided a minimally adequate description of the charge sufficient to enable preparation of a defense and a plea of double jeopardy, we reverse.

FACTS

In January 1981 the grand jury indicted the appellees on one count of mail fraud.[1] The mail fraud charge alleged a money-washing scheme that operated from 1972 to 1976, in part to avoid a state law requiring disclosure of contributions to state legislators. As of 1974, state law required that both lobbyists and their employers report lobbying expenditures. Wash. Rev. Code §§ 42.17.170, 42.17.180.

The indictment alleged that Buckley distributed $15,000 to state legislators on behalf of WWPC after receiving it in early June 1975. The indictment alleged that Buckley filed reports from January 1973 to

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1. The Government also indicted two of the appellees, Buckley and Washington Water Power Company, on one count of obstruction of justice. This count was not dismissed and is not in issue on appeal.

January 1976 in which he "intentionally failed to disclose the money paid to him in accordance with the scheme described in paragraph 2 of this indictment[2] and subsequently distributed by JEREMIAH P. BUCKLEY to members of the Washington State Legislature on behalf of WASHINGTON WATER POWER COMPANY." The only allegation of use of the mails in furtherance of the alleged fraudulent scheme is contained in the 28th

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2. Paragraph 2 of the indictment summarizes the charge:

> 2. It was part of the said scheme and artifice that JEREMIAH P. BUCKLEY, ELLSWORTH B. SARGENT, WASHINGTON WATER POWER COMPANY, SARGENT-TYEE CONSTRUCTION COMPANY, and Robert A. Perry entered with one another into a corrupt relationship in which each of them would and did act with intent to benefit himself and other defendants, directly and indirectly, through the use of fraud and deception. It was further part of the scheme to defraud that, during the spring 1972, Robert A. Perry, ELLSWORTH B. SARGENT, and JEREMIAH P. BUCKLEY, in order to circumvent the requirements of Washington State's public disclosure law (Initiative 276) which became effective January 1, 1973, developed a plan to have WASHINGTON WATER POWER

and final paragraph of the indictment:

On or about April 1, 1976, within the Western District of Washington, JEREMIAH P. BUCKLEY, ELLSWORTH B. SARGENT, WASHINGTON WATER POWER COMPANY, and SARGENT-TYEE CONSTRUCTION COMPANY, the defendants herein, for the purpose of executing the aforesaid scheme and artifice and attempting to

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2. (Continued)

COMPANY awared certain day crew contracts to SARGENT-TYEE CONSTRUCTION COMPANY and, in return, SARGENT-TYEE CONSTRUCTION COMPANY would kick back a portion of the proceeds to WASHINGTON WATER POWER COMPANY after first laundering the money through Sam Lee of Hong Kong. Thereafter said money was returned to WASHINGTON POWER COMPANY for undisclosed payments to members of the Washington State Legislature for the purpose of furthering the legislative interests of WASHINGTON WATER POWER COMPANY. These payments would then be intentionally omitted from the publicly filed disclosure statements required to be filed under the public disclosure statute, thereby concealing those payments from the voters of the State of Washington.

do so, knowingly caused to be delivered by mail, according to the direction thereon, an envelope addressed to the "Public Disclosure Commission, 403 Evergreen Plaza, 711 Capitol Way, Olympia, Washington 98504" containing Public Disclosure Commission Form L-3, Lobbyist Employer's Report, for the year 1975, from WASHINGTON WATER POWER COMPANY.

The district court granted in part the defendants' motion for a bill of particulars, including a request for further information about paragraph 28 of the indictment. The Government provided the following information relevant to paragraph 28:

> The L-3 filed by Washington Water Power Corporation for the year 1975 failed to report any of the money received from Robert A. Perry and spent on behalf of Washington Water

Power Corporation by Jeremiah Buckley.

The defendants moved for dismissal of the mail fraud count. The court granted the motion on the ground that the indictment and Bill of Particulars did not "establish that any payments to any particular legislatcrs made by Buckley in 1975 were not reported on the Form L-3 filed on April 1, 1976." The court found that without an explicit allegation that Buckley made payments to legislators in 1975 and intentionally omitted them from the Form L-3, there were insufficient facts supporting the allegation that the Lobbyist Form L-3 was false, and thus mailed in furtherance of the alleged scheme to defraud.

The Government appeals, pursuant to 18 U.S.C. § 3731.

DISCUSSION

I

Standard of Review

An indictment is sufficient if it contains the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy. Hamling v. United States, 418 U.S. 87, 117 (1974). Two corollary purposes of an indictment are: (1) to ensure that the defendants are being prosecuted on the basis of the facts presented to the grand jury, and (2) to allow the court to determine the sufficiency of the indictment. See Russell v. United States, 369 U.S. 749, 768-71 (1962); United States v. Bohonus, 628 F.2d 1167, 1173 (9th Cir.), cert. denied, 447 U.S. 928 (1980); United States v. Cecil, 608 F.2d 1294, 1296-97 (9th Cir. 1979); United

States v. Keith, 605 F.2d 462, 464 (9th Cir. 1979).[3]

Indictments alleging a scheme to defraud must provide sufficient facts to fulfill the purposes of an indictment. See United States v. Cecil, 608 F.2d at 1297 (citing with approval United States v. Curtis, 506 F.2d 985 (10th Cir. 1974), which held a mail fraud indictment invalid for failure to identify with particularity the nature of the alleged scheme). Yet,

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3. Before trial, these corollary purposes of an indictment are generally met if the indictment adequately informs the defendant of the charge to enable him to defend himself and plead double jeopardy. See, e.g., Hamling v. United States, 418 U.S. at 117; United States v. Chenaur, 552 F.2d 294, 301 (9th Cir. 1977). The instant indictment satisfies these corollary purposes. After trial, when the theory on which the Government has obtained a conviction is clear, these corollary purposes assume additional importance. See, e.g., United States v. Stewart Clinical Laboratory, 652 F.2d 804, 807 (9th Cir. 1981); United States v. Gordon, 641 F.2d 1281, 1285-87 (9th Cir.) cert. denied, 102 S.Ct. 312 (1981).

the issue in judging the sufficiency of the indictment is whether the indictment adequately alleges the elements of the offense and fairly informs the defendant of the charge, not whether the Government can prove its case. United States v. Thordarson, 646 F.2d 1323, 1337 & n.25 (9th Cir.), cert. denied, 102 S.Ct. 601 (1981).

The allegations of the indictment are presumed to be true. Boyce Motor Lines v. United States, 342 U.S. 337, 343 n.16 (1952). The Government need not allege its theory of the case or supporting evidence, but only the "essential facts necessary to apprise a defendant of the crime charged."

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3. (Continued)

Because an indictment must be returned by the grand jury, a bill of particulars that may give the defendants adequate notice of the charge against them cannot save an invalid indictment. Russell v. United States, 369 U.S. at 770.

United States v. Markee, 425 F.2d 1043, 1047-48 (9th Cir.), cert. denied, 400 U.S. 847 (1970). We review de novo the sufficiency of the indictment. See United States v. Bohonus, 628 F.2d at 1173; United States v. Chenaur, 552 F.2d at 301.[4]

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4. The rule that indictments that are challenged after trial are liberally construed in favor of validity, see, e.g., United States v. Pheaster, 544 F.2d 353, 361 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977), does not apply to this case where the defendants timely challenged the indictment before trial. In 1932 the Supreme Court left open the question whether an indictment should be read more strictly before trial than after trial. In Hagner v. United States, 285 U.S. 427 (1932), the Court upheld an indictment for mail fraud that failed explicitly to allege delivery of a letter in furtherance of a fraudulent scheme, because that fact could be presumed from the indictment's allegations that the letter was placed in the mail. The Court stated, however, that it was deciding only that the "loosely and inartificially drawn" indictment was sufficient, in the absence of a showing of prejudice, after conviction; and that it was not "deciding that the indictment would not have been open to some form of challenge at an earlier stage of the case". Id. at 433.

II

Fraudulent Scheme

The essential elements of mail fraud under 18 U.S.C. § 1341 are: (1) a scheme to defraud; and (2) a knowing use of the mail to execute the scheme. United States v. Kaplan, 554 F.2d 958, 965 (9th Cir.), cert. denied, 434 U.S. 956 (1977). The appellees contend that the alleged scheme was not a scheme to defraud under the statute, relying on United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976). In Dixon, the court held that nondisclosure by a corporate official of certain loans in

4. (Continued)

Neither the Supreme Court nor our circuit has explicitly answered this question. It appears that we have conducted a searching de novo review of an indictment dismissed before trial on sufficiency grounds. See, e.g., United States v. Inryco, Inc., 642 F.2d 290, 294-95 (9th Cir. 1981), cert. dismissed, 102 S.Ct. 1045 (1982). We follow this procedure here.

violation of SEC regulations was not a scheme to defraud because the shareholders did not rely on the disclosure regulations, and the nondisclosure was not intended to secure money or property in a fraudulent manner. Id. at 1398-400. In contrast, the Government alleges that the defendants here did not disclose all of their contributions to state legislators in violation of a state statute for the purpose of hiding contributions that were intended to influence the officials improperly.

Fraudulent schemes include those that are "contrary to public policy or which fail to measure up to the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" United States v. Bohonus, 628 F.2d at 1171.

In Bohonus, we concluded that "depriving an employer of one's honest services

and of its right to have its business conducted honestly can constitute a 'scheme to defraud' under § 1341." Id. at 1171-72. See also United States v. Louderman, 576 F.2d 1383, 1387-88 (9th Cir.), cert. denied, 439 U.S. 896 (1978) (scheme to gather private information by deception was fraudulent).

In light of Bohonus and Louderman, we hold that the Government adequately alleged a "scheme to defraud" Washington citizens of their statutory right to know who made what political payments to whom, and a knowing use of the mails to further the scheme in violation of the mail fraud statute.

III

Use of the Mail

The district court concluded that the indictment would have sufficiently alleged use of the mails to execute a scheme to

defraud if it had alleged that WWPC had filed a false Lobbyist Employer's Report in 1976 that did not disclose payments to legislators.

The Government concedes that "the only way [the disclosure form] could be in execution or furtherance [of a scheme to defraud] is if it were false." It argues that it was not necessary for it to allege that the report was false, and insists that it was sufficient for it to allege that the mailing of the report was for the purpose of executing the scheme. It contends that the allegation of a false mailing is evidentiary in nature and relates only to its theory of the crime, not to the sufficiency of the indictment. The Government contends that it need not explicitly state that WWPC filed a false form by failing to report 1975 payments to legislators because it implied that fact when it alleged a money laundering scheme in 1975, payments

to legislators as a result of that scheme, and the mailing of a Lobbyist Employer's Report for the year 1975 in furtherance of the scheme. We agree.

Because the indictment implicitly alleged the falsity of the disclosure report, it was clear enough to give the defendants notice of the crime charged and to allow them to plead double jeopardy. See United States v. Castor, 558 F.2d 379, 385 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978) (Government need not allege evidentiary facts sufficient to prove its allegation that mailings were made in furtherance of a fraudulent scheme). The Government's allegation that the mailing of the disclosure form was in execution of the scheme to make undisclosed payments to legislators referred to that part of the indictment that alleged that the mailed disclosure form falsely failed to disclose

such payments. The indictment in paragraph 2 stated:

> Thereafter [the money laundered through Hong Kong] was returned to Washington Water Power Company for undisclosed payments to members of the Washington State Legislature for the purpose of furthering the legislative interests of Washington Water Power Company. These payments would then be intentionally omitted from the publicly filed disclosure statements required to be filed under the public disclosure statute . . . .

The indictment concluded in paragraph 28 by stating that the defendants, "for the purpose of executing aforesaid scheme and artifice and attempting to do so, knowingly caused to be delivered by mail . . . [a] Public Disclosure Commission Form L-3, Lobbyist Employer's Report, for the year 1975, from Washington Water Power Company."

Although a mailing need not be false to be in furtherance of a scheme to defraud, see United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981); Byron v. United States, 273 F. 769, 771-72 (9th Cir.), cert. denied, 257 U.S. 653 (1921), the parties to not dispute that the only way the mailing of the disclosure form could be in furtherance of the scheme to make secret political payments is if it falsely failed to report such payments as alleged in paragraph 2 of the indictment. What the district court believed that the indictment failed to do was to include any facts supporting the allegation that the Lobbyist Form L-3 was mailed in furtherance of the alleged scheme. It is true that the Government did not specifically allege that Buckley made payments to legislators in the year 1975 and that these payments were intentionally omitted from the Lobbyist Form mailed in 1976. But an indictment

should be: (1) read as a whole; (2) read to include facts which are necessarily implied; and (3) construed according to common sense. See United States v. Inryco, Inc., 642 F.2d at 294; United States v. Anderson, 532 F.2d 1218, 1222 (9th Cir.), cert. denied, 429 U.S. 839 (1976).

In this case, the crucial allegation that Buckley made payments to legislators in 1975 and intentionally omitted them from the disclosure form was necessarily implied in the three sentences of the indictment quoted above. In the first crucial sentence of the indictment, at paragraph 2, the Government alleged that WWPC had money set aside for payments to legislators. The second crucial sentence alleged that these payments would be intentionally omitted from the disclosure statement. Although the indictment does not explicitly allege that any money was delivered to any legislators, this fact is necessarily implied.

There is no way that payments could be intentionally omitted from the disclosure statement if none were ever made. Moreover, the making of such payments is not an element of the crime. Cf. United States v. Debrow, 346 U.S. 374 (1953) (although an essential element of the crime of perjury is that the defendants be administered an oath authorized by law, indictment was sufficient when it alleged that the defendants had "duly taken an oath;" allegation that the person giving the oath was authorized to give it was unnecessary.)

The third crucial sentence of the indictment, at paragraph 28, alleges that in 1976 WWPC mailed the disclosure form for the year 1975 in furtherance of the alleged scheme. Although the indictment fails to allege explicitly that WWPC made payments to legislators in 1975, that fact is

necessarily implied when these three sentences are read together. The only way that the 1975 disclosure form could have been mailed in furtherance of the alleged scheme, as charged in paragraph 28, is for WWPC intentionally to omit the payments to legislators from the disclosure statement, as charged in paragraph 28, is for WWPC intentionally to omit the payments to legislators from the disclosure statement, as charged in paragraph 2. Cf. Pipefitters Local Union v. United States, 407 U.S. 385, 439 n.48 (1972) (dictum) (reading allegations of an indictment together to draw inferences to determine sufficiency). Thus, the defendants had sufficient notice of the charged crime to prepare a defense and plead double jeopardy despite the fact

that the indictment was lengthy, confusing, and largely irrelevant.[5]

It is immaterial that at a hearing about the sufficiency of the indictment, the Government conceded that it could not prove the omission in the 1976 Lobbyist Report of any specific payment to any specific legislator in 1975 and that the Government refused to make such specific allegations in the bill of particulars. It was possible for the Government to prove these payments to unknown legislators with circumstantial evidence, rather

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5. Although Fed.R.Crim.P. 7(c) requires that the indictment be a "plain, concise and definite written statement of the essential facts constituting the offense charged," the courts have construed this language to require little more than that the indictment give the defendants sufficient notice of the crime. See United States v. Debrow, 346 U.S. 374 (1953); United States v. Root, 366 F.2d 377, 384 (9th Cir. 1966), cert. denied, 386 U.S. 912 (1967).

than direct evidence. Although the Government was reticent about its theory, it apparently wanted a jury to infer that because legislation important to WWPC passed by one vote in 1975 and WWPC had established a laundering scheme which put $15,000 in Buckley's hands in 1975, that Buckley must have given it to some unknown legislators in 1975 to influence their votes, and that consequently WWPC failed to disclose those 1975 payments in the 1976 Lobbyist Form.

Although the Government's theory appears weak, and a judgment of acquittal may be granted if the Government presents inadequate evidence at trial, the weakness of the Government's case is irrelevant to the sufficiency of the indictment. See United States v. Thordarson, 646 F.2d at 1337 n.25. At this stage of the proceedings it is unknown whether the Government

has overwhelming circumstantial evidence to support its theory. The indictment stage of the proceedings is not the appropriate time to require the Government to present its proof. See United States v. Sampson, 371 U.S. 75, 78-79 (1962).[6]

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6. There is some indication in the record that the district court dismissed the indictment in part because it believed that it would have to grant a motion for acquittal at the end of the Government's case. Buckley contends that a judgment of acquittal is proper before the Government has presented its case when it is clear that the Government's proof is insufficient. See United States v. Ubl, 472 F.Supp. 1236 (N.D. Ohio 1979) (motion for acquittal granted in the middle of the Government's case after it was apparent that Government could not introduce sufficient evidence); United States v. Maryland Cooperative Milk Producers, Inc., 145 F.Supp. 151 (D.D.C. 1956) (motion for acquittal granted after Government stipulated to certain facts that precluded conviction); United States v. Dietrich, 126 F. 676, 677-78 (C.C.D. Neb. 1904) (directed verdict for defendant proper after Government admitted a fact during its opening statement that precluded conviction). We need not decide the validity of these cases in light of United States v. Martin Linen Supply Co., 430 U.S. 564, 570 n.8 (1977) (dictum that a motion

In charging mail fraud, the Government is required only to make specific factual allegations concerning the mailing allegedly in furtherance of the alleged scheme to defraud. See United States v. Livengood, 427 F.2d 420, 423 (9th Cir. 1970) (mail fraud indictment couched in the language of the statute was sufficient and met the requirements of Fed.R. Crim.P. 7(c) where the alleged schemes were particularized in some detail). We hold that the Government made barely sufficient allegations in this mail fraud indictment.

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6. (Continued)

for judgment of acquittal can be entertained at the earliest, after the evidence on either side is closed). In the instant case, unlike the Ubl line of cases, the Government has not conceded that it could not prove the falsity of the disclosure form, nor stipulated that it had provided the court and the defendants with all its evidence on this issue.

IV

Other Issues

The appellees contend that the mailing was "legally compelled" under Parr v. United States, 363 U.S. 370 (1960), and thus not in execution of a fraudulent scheme. Parr involved a situation where the legally compelled mailing was not made in furtherance of a scheme to defraud. In this case the Government alleges that the false mailing of the 1976 disclosure form was in furtherance of the scheme to make secret payments to legislators. See United States v. Bagnariol, 665 F.2d 877, 899 (9th Cir. 1981) (per curiam), cert. denied, 102 S.Ct. 2040 (1982). Compare United States v. Curry, 681 F.2d 406, 412 (5th Cir. 1982).

The Government contends that this case should be remanded for trial before a different judge, because the district court has indicated that it found the Government

case to be weak. We find this request to be frivolous in light of the Government's concession that the district court has shown no personal bias. See United States v. Doe, 655 F.2d 920, 929 (9th Cir. 1980). Not only was it proper for the court to express its opinion about the Government's case; we note our agreement with the district court's preliminary assessment of the weakness of the Government's case. We hold only that the district court erred in dismissing the indictment too early in the criminal proceedings. If the Government does not offer substantial evidence to support its theory by the time it rests its case, the district court can properly grant a motion for acquittal.

CONCLUSION

Because the indictment implicitly alleged the falsity of the disclosure report and was clear enough to give the defendants notice of the crime charged and to allow them to plead double jeopardy, we reverse the dismissal of the indictment.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellant,	)	No. 81-1597
v.	)	DC No. CR 81-21-1/4
	)	
JEREMIAH P. BUCKLEY,	)	ORDER
ELLSWORTH B. SARGENT,	)	
WASHINGTON WATER POWER CO., and	)	
SARGENT-TYEE CONSTRUCTION CO.,	)	
	)	
Appellees.	)	

Appeal from the United States District Court for the Western District of Washington
Donald S. Voorhees, District Judge, Presiding

Before: KILKENNY, HUG, and SKOPIL, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. JEREMIAH P. BUCKLEY, et al. Defendants.	NO. CR 81-021V ORDER DISMISSING COUNT I OF INDICTMENT AND DENYING MOTION TO DISMISS COUNT II

THIS MATTER having come on regularly for hearing before the undersigned judge of the above entitled court upon the motions of the defendants for an order dismissing Count I and Count II of the Indictment herein, the United States appearing and being represented by Michael P. Ruark, Assistant United States Attorney, defendant Jeremiah P. Buckley appearing and being represented by William A. Helsell, his attorney, defendant Ellsworth B. Sargent appearing and being represented by William

K. Goodwin, his attorney, defendant Washington Water Power Company appearing and being represented by Arthur W. Harrigan, Jr. and Larry S. Gangnes, its attorneys, and defendant Sargent-Tyee Construction Company appearing and being represented by Dennis E. Kenney, its attorney, and the court having considered the memoranda and affidavits filed in support of and in opposition to said motions, and the bill of particulars and the amended bill of particulars filed herein by the United States, and having listened to oral argument of counsel and being fully advised in the premises, now makes and enters the following order:

1. COUNT I.

Count I of the indictment is hereby dismissed with prejudice. This ruling is made for the following reasons:

(a) The only conduct on the part of the defendants which is relied on by the

government to invoke the provisions of the mail fraud statute (Title 18 U.S.C. § 1341) is the mailing of the Form L-3 for the year 1975 on or about April 1, 1976 to the Public Disclosure Commission of the State of Washington. The mailing of that form is also the only act alleged by the government to have occurred within the period of the five-year criminal statute of limitations (Title 18 U.S.C. § 3282).

(b) Although the indictment alleges that earlier forms filed with the Public Disclosure Commission for the State of Washington "intentionally failed to disclose" the monies paid to the defendant Buckley and subsequently distributed by him to members of the Washington State Legislature, paragraph 28 of the indictment fails to make that allegation as to the Form L-3 filed on April 1, 1976.

(c) Partly because of the failure of the indictment to make that critical

allegation as to the Form L-3 filed on April 1, 1976, this court granted the motion of the defendants for a bill of particulars on March 19, 1981 and required the government to specify, among other things, as to paragraph 28:

> . . . which payments or expenditures, if any, were omitted from the Form L-3 for the year 1975, and by identifying any other statements contained in said form which it is contended were untrue, and the respect in which it is contended they were untrue and by stating whether it is contended that any required information was omitted from said report and, if so, by identifying all such information.

In response to this court's order, the government filed its bill of particulars on April 15, 1981, saying simply, with reference to the Form L-3 in question:

> The L-3 filed by Washington Water Power Corporation for the year 1975 failed to report any of the money received from Robert A. Perry and spent on behalf of Washington Water Power Corporation by Jeremiah Buckley.

It should be noted that Washington law does not require that payments made to a lobbyist to be distributed by him for political purposes be reported. The forms L-3 only require that amounts paid by a lobbyist to persons holding public office be reported. The response by Bill of Particulars above quoted did not go far enough to establish that any payments to any particular legislators made by Buckley in 1975 were not reported on the Form L-3 filed on April 1, 1976.

(d) The indictment uniformly alleges as to each of the sums received by Jeremiah P. Buckley from Robert A. Perry that the monies were thereafter distributed on behalf of Washington Water Power Company ". . . to Washington State legislators presently unknown to the grand jury." See paragraphs 23(a), (b) and (c). It thus appears on the face of the indictment and

from the Bill of Particulars that the government is completely unable to prove that any particular payment was made by Mr. Buckley to any particular legislator at any particular time from the monies allegedly received from Robert A. Perry. Mr. Ruark, the attorney for the government, frankly conceded this in oral argument before the court.

(e) In the opinion of the court the government is required to both allege and prove that payments were made to Washington legislators by the defendant Buckley in the year 1975, and that those payments were intentionally omitted from the Form L-3 in question. Without such allegation and proof, there is no charge of or evidence of falsity of the Form L-3. Without an allegation and proof of falsity of the Form L-3, the indictment does not allege facts establishing that that form was mailed

". . . for the purpose of executing the aforesaid scheme and artifice". The conclusory allegation to that effect in the indictment in a case where falsity of Public Disclosure Commission filings is the crux of the mail fraud scheme alleged is inadequate to properly inform the defendants of the charge against them. For all of the above reasons the indictment is fatally defective. Any court, having proceeded with trial of this action, would, in the absence of evidence of falsity of the 1976 Form L-3, be compelled in this court's opinion to grant the defendants' motion for judgment of acquittal at the conclusion of the government's case. This court is unable to find from the description of other circumstantial evidence available to the government given by Mr. Ruark during argument, that there is available to the government any evidence

sufficient to withstand a motion for judgment of acquittal at the end of the government's case to show that the Form L-3 in question was false.

For all of the foregoing reasons, the court is of the opinion that Count I must be dismissed.

2. COUNT II

Defendants' motion to dismiss Count II of the indictment is denied. The fact that the case of United States v. Robert A. Gulino, No. CR77-158M, was pending in the Western District of Washington during the time referred to in Count II provides a sufficient basis for the trial of that count in this district and the court is not persuaded that the defendants Washington Water Power Company and Jeremiah P. Buckley are entitled to be tried in the Eastern District of Washington simply because all of their activities occurred there. The court finds the reasoning of the opinions

in United States v. O'Connell, 510 F.2d 1190 (6th Cir. 1974), and United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980), more persuasive than the reasoning of the opinions in other circuits to the contrary.

DONE IN OPEN COURT this 21 day of August, 1981.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO. CR 81-021V
v.	)	
	)	INDICTMENT
JEREMIAH P. BUCKLEY, ELLSWORTH B. SARGENT, WASHINGTON WATER POWER COMPANY, and SARGENT-TYEE CONSTRUCTION COMPANY,	)	
Defendants.	)	

The Grand Jury charges that:

COUNT I

1. Beginning at some point prior to April 1972 and continuing thereafter until October 1977, in the Western District of Washington and elsewhere, JEREMIAH P. BUCKLEY, ELLSWORTH B. SARGENT, WASHINGTON WATER POWER COMPANY, and SARGENT-TYEE CONSTRUCTION COMPANY, the defendants herein, and Robert A. Perry devised and

intended to devise a scheme and artifice:

(a) to defraud the citizens of the State of Washington of their right to the conscientious, loyal, faithful, disinterested, and unbiased services, actions, and performance of official duties by members of the Washington State Legislature openly and honestly, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud;

(b) to defraud the citizens of the State of Washington of their right to have the State's electoral processes conducted openly and honestly, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud and in accordance with the laws of the State of Washington;

(c) to defraud the citizens of the State of Washington of their right to know of any benefits, financial or otherwise, conferred upon members of the Washington

State Legislature by WASHINGTON WATER POWER COMPANY and JEREMIAH P. BUCKLEY as lobbyist for WASHINGTON WATER POWER COMPANY.

2. It was part of the said scheme and artifice that JEREMIAH P. BUCKLEY, ELLSWORTH B. SARGENT, WASHINGTON WATER POWER COMPANY, SARGENT-TYEE CONSTRUCTION COMPANY, and Robert A. Perry entered with one another into a corrupt relationship in which each of them would and did act with intent to benefit himself and other defendants, directly and indirectly, through the use of fraud and deception. It was further part of the scheme to defraud that, during the spring 1972, Robert A. Perry, ELLSWORTH B. SARGENT, and JEREMIAH P. BUCKLEY, in order to circumvent the requirements of Washington State's public disclosure law (Initiative 276) which became effective January 1, 1973, developed a plan to have WASHINGTON WATER POWER COMPANY award

certain day crew contracts to SARGENT-TYEE CONSTRUCTION COMPANY and, in return, SARGENT-TYEE CONSTRUCTION COMPANY would kick back a portion of the proceeds to WASHINGTON WATER POWER COMPANY after first laundering the money through Sam Lee of Hong Kong. Thereafter said money was returned to WASHINGTON WATER POWER COMPANY for undisclosed payments to members of the Washington State Legislature for the purpose of furthering the legislative interests of WASHINGTON WATER POWER COMPANY. These payments would then be intentionally omitted from the publicly filed disclosure statements required to be filed under the public disclosure statute, thereby concealing those payments from the voters of the State of Washington.

3. Beginning in January 1973, and continuing to the date of this Indictment, Initiative 276, as adopted by the people of

the State of Washington in the November 1972 general election and codified in the Revised Code of Washington, Title 42, Chapter 17, incorporated by reference herein, provided in part:

42.17.010 Declaration of policy

It is hereby declared by the sovereign people to be the public policy of the state of Washington:
(1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.

* * *

(10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.

42.17.170 Reporting by lobbyists

. . . any person who lobbies shall file with the commission periodic reports of his activities signed by the lobbyist. . . .

(2) Each such monthly periodic report shall contain:

(a) The totals of all expenditures made or incurred by such lobbyist or by the lobbyist's employer during the period covered by the report, . . .

42.17.180 Reports by employers of registered lobbyist

Every employer of a lobbyist registered under this Chapter during the preceding calendar year shall file with the commission on or before March 31st of such year a statement disclosing for the preceding calendar year the following information:

* * *

(3) The total expenditures made by the employer for lobbying purposes, whether through or on behalf of a registered lobbyist or otherwise.

4. At all times material to this Count of this Indictment, WASHINGTON WATER POWER COMPANY, a corporation incorporated under the laws of the State of Washington, was a private utility providing electrical power to Eastern Washington and Northern Idaho.

5. At all times material to this Count of this Indictment, SARGENT-TYEE

CONSTRUCTION COMPANY, a corporation incorporated under the laws of the State of Washington, was engaged in providing electrical construction services to public and private utilities in the State of Washington.

6. At all times material to this Count of this Indictment, JEREMIAH P. BUCKLEY was Vice President and Secretary of Washington Water Power Company and performed all the duties, functions, and roles attendant upon him as Vice President of Washington Water Power Company which included representing Washington Water Power Company before the Washington State Legislature as a lobbyist.

7. At all times material to this Count of this Indictment, ELLSWORTH B. SARGENT was President of Sargent-Tyee Construction Company and performed all the

duties, functions, and roles attendant upon him as President of Sargent-Tyee Construction Company.

8. At all times material to this Count of this Indictment, Robert A. Perry was an Assistant to the President of Sargent-Tyee Construction Company and was an elected Representative to the Washington State Legislature performing the duties, functions, and roles attendant upon him as a duly elected member of the House of Representatives.

9. At all times material to this Count of this Indictment, Sam Lee was a resident of Hong Kong engaged in business enterprises there and elsewhere and was president of SEA Engineering, Ltd., and Trans Pac Services Corporation, Ltd.

10. That on March 29, 1972, Initiative 276, a proposed Washington State

public disclosure law, was filed with the Secretary of State in Olympia, Washington.

11. It was further part of the scheme and artifice that on April 17, 1972, ELLSWORTH B. SARGENT and Robert A. Perry traveled to Spokane, where they met with JEREMIAH P. BUCKLEY and adopted and agreed to the scheme and artifice as described in paragraph 2 of this Indictment.

12. The participation of each defendant in the scheme was, in part, as follows:

(a) ELLSWORTH B. SARGENT, individually and as an officer of SARGENT-TYEE CONSTRUCTION COMPANY, would and did act with intent to circumvent the requirements of Washington State's public disclosure law (Initiative 276) by acting as a conduit for money paid by WASHINGTON WATER POWER COMPANY to SARGENT-TYEE CONSTRUCTION COMPANY for services rendered and by providing a vehicle for transfer of said

money to Sam Lee of Hong Kong who would thereafter cause the return of said money to WASHINGTON WATER POWER COMPANY for use in making undisclosed payments to members of the Washington State Legislature for the purpose of furthering the legislative interests of WASHINGTON WATER POWER COMPANY.

(b) JEREMIAH P. BUCKLEY, individually and as an officer of WASHINGTON WATER POWER COMPANY, would and did act with intent to circumvent the requirements of Washington State's public disclosure law (Initiative 276) by causing money to be paid by WASHINGTON WATER POWER COMPANY to SARGENT-TYEE CONSTRUCTION COMPANY, which would forward a portion of the money to Sam Lee of Hong Kong, who would thereafter cause the return of said money to WASHINGTON WATER POWER COMPANY for undisclosed payments to members of the Washington State

Legislature for the purpose of furthering the legislative interests of WASHINGTON WATER POWER COMPANY.

13. It was further part of the scheme and artifice that SARGENT-TYEE CONSTRUCTION COMPANY did submit a bid for day crew work to WASHINGTON WATER POWER COMPANY on May 23, 1972, said bid being fifth highest out of a field of six.

14. On July 6, 1972, the Secretary of State of the State of Washington certified Initiative 276 for the November 7, 1972 general election.

15. In the November 7, 1972 general election, the voters of the State of Washington adopted Initiative 276 to become effective January 1, 1973.

16. It was further part of the scheme and artifice that SARGENT-TYEE CONSTRUCTION COMPANY commenced day crew work for WASHINGTON WATER POWER COMPANY on November 28,

1972, at a time when lower bidders from the May 1972 submission were not offered the work.

17. It was further part of the scheme and artifice that on November 29, 1972, ELLSWORTH B. SARGENT met with WASHINGTON WATER POWER COMPANY personnel.

18. It was further part of the scheme and artifice that SARGENT-TYEE CONSTRUCTION COMPANY, alone among the bidders of May 23, 1972, was allowed to submit a revised bid to WASHINGTON WATER POWER COMPANY for day crew work on December 1, 1972, said bid appearing to move SARGENT-TYEE CONSTRUCTION COMPANY to the position of third lowest bidder.

19. It was further part of the scheme and artifice that on December 8, 1972, WASHINGTON WATER POWER COMPANY awarded a day crew contract to SARGENT-TYEE CONSTRUCTION COMPANY in accordance with its December 1, 1972 bid.

20. It was further part of the scheme and artifice that SARGENT-TYEE CONSTRUCTION COMPANY and other contractors submitted bids for day crew work on February 3, 1973, for the following contract year.

21. It was further part of the scheme and artifice that on February 8, 1973, SARGENT-TYEE CONSTRUCTION COMPANY submitted a bill to WASHINGTON WATER POWER COMPANY for day crew work started on November 27, 1972, and thereafter WASHINGTON WATER POWER COMPANY paid said bill.

22. Thereafter, WASHINGTON WATER POWER COMPANY awarded substantial day crew work to SARGENT-TYEE CONSTRUCTION COMPANY, even though SARGENT-TYEE CONSTRUCTION COMPANY was frequently the highest bidder, and paid SARGENT-TYEE CONSTRUCTION COMPANY substantial amounts of money pursuant to those contracts.

23. It was further part of the scheme and artifice that SARGENT-TYEE CONSTRUCTION

COMPANY would pay Sam Lee of Hong Kong certain sums of money and, thereafter, Robert A. Perry, at various times, would and did obtain a portion of said money from Sam Lee and pay it to JEREMIAH P. BUCKLEY, who distributed the money to Washington State legislators on behalf of WASHINGTON WATER POWER COMPANY, to wit:

(a) On April 22, 1973, Robert A. Perry traveled from the Western District of Washington to Hong Kong where he delivered to Sam Lee a SARGENT-TYEE CONSTRUCTION COMPANY check in the amount of $11,015.00. Sam Lee negotiated the check in Hong Kong, retained $1,000.00 as his fee, and returned the remaining $10,000.00 to Robert A. Perry. On or about May 13, 1973, Robert A. Perry traveled from Hong Kong to Vancouver, B.C. where, on approximately May 17, 1973, he paid the $10,000.00 to JEREMIAH P. BUCKLEY who had traveled from the State of Washington to meet Robert

A. Perry. Thereafter, JEREMIAH P. BUCKLEY distributed that money on behalf of WASHINGTON WATER POWER COMPANY to Washington State legislators presently unknown to the Grand Jury.

(b) On approximately November 20, 1973, Robert A. Perry received a check in the amount of $15,000.00, made payable to SEA Engineering, Ltd., drawn on the account of SARGENT-TYEE CONSTRUCTION COMPANY. On or about December 3, 1973, Robert A. Perry traveled from the Western District of Washington to Hong Kong where he delivered the check to Sam Lee, President of SEA Engineering, Ltd. Sam Lee negotiated the check in Hong Kong, retained $1,500.00 as his fee, and returned the remaining $13,500.00 to Robert A. Perry. On or about December 19, 1973, Robert A. Perry traveled from Hong Kong to Vancouver B.C., where, on approximately December 20, 1973, he paid the $13,500.00 to JEREMIAH P. BUCKLEY who

had traveled from the State of Washington to meet Robert A. Perry. Thereafter, JEREMIAH P. BUCKLEY distributed that money on behalf of WASHINGTON WATER POWER COMPANY to Washington State legislators presently unknown to the Grand Jury.

(c) During the winter and spring of 1975, Robert A. Perry telephoned Sam Lee in Hong Kong and told him to bring $15,000.00 to the United States. During the spring of 1975, Sam Lee traveled to the United States, where he gave $15,000.00 to Robert A. Perry. In late May or early June 1975 in Seattle, Robert A. Perry paid the $15,000.00 to JEREMIAH P. BUCKLEY who distributed that money on behalf of WASHINGTON WATER POWER COMPANY to Washington State legislators presently unknown to the Grand Jury.

24. It was further part of the scheme and artifice that during March 1975, ELLSWORTH B. SARGENT prepared SARGENT-TYEE

CONSTRUCTION COMPANY's bid for WASHINGTON WATER POWER COMPANY's 1975 day crew contracts, which bid included an additional 10%. Thereafter, prior to submission of the bid, ELLSWORTH B. SARGENT discussed the amount of the bid with WASHINGTON WATER POWER COMPANY personnel and was directed to reduce the bid by 5%.

25. It was further part of the scheme and artifice that on July 2, 1975, SARGENT-TYEE CONSTRUCTION COMPANY issued a check payable to Trans Pac Services Corporation, Ltd., in the amount of $15,000.00, and the check was subsequently negotiated.

26. It was part of the scheme and artifice that beginning in January 1973 and continuing through January 1976, JEREMIAH P. BUCKLEY filed reports as a registered lobbyist with the Public Disclosure Commission in which he intentionally failed to disclose the money paid to him in accordance with the scheme described in paragraph

2 of this Indictment and subsequently distributed by JEREMIAH P. BUCKLEY to members of the Washington State Legislature on behalf of WASHINGTON WATER POWER COMPANY.

27. On January 31, 1975, WASHINGTON WATER POWER COMPANY submitted Public Disclosure Commission Form L-3, Lobbyist Employer's Report, that intentionally failed to disclose the moneys paid to JEREMIAH P. BUCKLEY in accordance with the scheme described in paragraph 2 of this Indictment and subsequently distributed by JEREMIAH P. BUCKLEY to members of the Washington State Legislature on behalf of WASHINGTON WATER POWER COMPANY.

28. On or about April 1, 1976, within the Western District of Washington, JEREMIAH P. BUCKLEY, ELLSWORTH B. SARGENT, WASHINGTON WATER POWER COMPANY, and SARGENT-TYEE CONSTRUCTION COMPANY, the defendants herein, for the purpose of executing the aforesaid scheme and artifice

and attempting to do so, knowingly caused to be delivered by mail, according to the direction thereon, an envelope addressed to the "Public Disclosure Commission, 403 Evergreen Plaza, 711 Capitol Way, Olympia, Washington 98504" containing Public Disclosure Commission Form L-3, Lobbyist Employer's Report, for the year 1975, from WASHINGTON WATER POWER COMPANY.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT II

Commencing in the spring of 1977 and continuing until the fall of 1977, within the Western District of Washington and elsewhere, JEREMIAH P. BUCKLEY and WASHINGTON WATER POWER COMPANY, the defendants herein, and Robert A. Perry, unlawfully, willfully and knowingly did corruptly endeavor to influence, obstruct or impede the due administration of justice in

connection with the proceeding then pending before the United States District Court for the Western District of Washington, by arranging for Robert A. Perry to be employed outside of the United States, to wit: in Mexico, to prevent Robert A. Perry from appearing and testifying in the trial of the case of United States v. Robert A. Gulino, No. CR77-158M.

All in violation of Title 18, United States Code, Section 1503 and Section 2.

A TRUE BILL:

DATED: January 20, 1981

/s/
FOREPERSON

/s/ JOHN C. MERKEL
United States Attorney

/s/ MICHAEL P. RUARK
Assistant United States Attorney

/s/ BRUCE D. CARTER
Special Assistant U.S. Attorney

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	NO. CR81-21V
vs.	)	
	)	
JEREMIAH P. BUCKLEY, et al.,	)	
Defendants.	)	

EXCERPT FROM PROCEEDINGS

Before The Honorable DONALD S. VOORHEES
Wednesday, August 19, 1981
U. S. District Courthouse
Seattle, Washington

APPEARANCES:

For the Plaintiff:	MICHAEL RUARK Asst. United States Attorney
For the Defendants: For J. P. Buckley	WILLIAM HELSELL Washington Building Seattle, WA 98101
For Sargent-Tyee Construction Company	DENNIS E. KENNY Seafirst Building Seattle, WA 98104
For Washington Water Power Company	LARRY GANGNES ARTHUR HARRIGAN, Jr. Rainier Tower Building Seattle, WA 98101

For E. P. Sargent — WILLIAM GOODWIN
Norton Building
Seattle, WA 98104

Also appearing:
For Post Intelligencer — DAVID UTEVSKY
Seafirst Building
Seattle, WA 98104

THE COURT: Very well. The motions I would like to take up first have to do with the motion to dismiss Count 1. I will take up discovery motions later. So there is a motion to dismiss the mail fraud count. May I hear from the movers? I am particularly concerned about the statute of limitations aspect of it.

MR. HELSELL: With reference to your Honor's last observation let me say that the statute of limitations aspect of it is likewise directly involved in whether or not a mail fraud scheme has been alleged. We said in recent motions to be filed before your Honor that lynch cannot govern this whole case, the allegation that a

public disclosure commission form filed in April 1976 is a part of this alleged fraudulent scheme.

THE COURT: It really has to be, doesn't it, to get it within the statute?

MR. HELSELL: It absolutely has to be because there isn't another act alleged in the indictment that didn't occur more than five years before the indictment was returned. But let me say first about our motion to dismiss that our government in the early days was said by many political writers to be a government of laws not men, and I say this with as much sincerity as I can muster because I think what we have graduated to in the indictment which you have before you is symptomatic of a subtle change that has come over the criminal law in recent decades and perhaps the last fifty years where we suddenly find ourselves a government of men not laws.

And the reason I say that, your Honor, is this: We have here a strained and distorted effort, I submit, to find that acts described in the indictment violate the mail fraud statute and we have a situation where a defendant, even if we concede for purposes of argument that he was engaged in all of the things and did all of the acts alleged in the indictment, could hardly have gone to one lawyer out of ten to ask him whether there was any federal offense involved in what he was doing and have been told, "yes, I think what you are doing violates the mail fraud statute." And what we have, in essence, is the fertile imagination of our assistant U.S. attorneys who have concluded that the mail fraud statute has been violated by the acts which they have alleged, and in a way which, I submit, produces of necessity a tortured and strained construction of that statute.

A highschooler would conclude if told that there was a mail fraud statute that the offense must be something that involves the mails to defraud somebody and in the ordinary connotation of fraud would consider that what the person who violates that statute must probably have done is to cheat somebody out of some money or property and used the mails to do it.

And I submit that that was the genesis of our mail fraud statute, and yet we see cases cited by the government here where the statute has been strained to cover the situation where a politician takes money wrongfully -- that is said to be a fraud on the public -- and where somehow the mails are utilized in connection with that kind of a scheme.

THE COURT: Don't you think I am bound by those decisions though?

MR. HELSELL: No. And that's what I want to get to next. Here we do not have

even one of those cases. We do not have a Governor Mandell case of Maryland, for example. We have a case where the indictment is totally silent as to any claim that any politician received one dollar wrongfully. It is totally silent as to any charge of bribery, corruption, improper undercover payment to any politician. So we do not have a Mandell case. We do not have a United States vs. States case. We do not have any of the cases which have involved corrupt and crooked politicians who utilized the mails in connection with their corrupt scheme.

And if your Honor will carefully read the Dixon case which we have cited to the Court you will see that therein lies the distinction which was applied by Judge Friendly in Dixon which we urge your Honor to apply here.

In the Dixon case Mr. Dixon, a corporate officer, had received loans from his

company which were required to be reported to the SEC and there, as contrasted with here, at least the Government could point to the specific loan because they showed in the records of his company. They could point to his SEC filings and establish beyond the shadow of a doubt that his SEC filings were technically false. And they could also point to mailings which were involved in the solicitation of proxy statements. But Judge Friendly, holding the case up by its four corners and analyzing every aspect of the transaction, said in words which are applicable to this case, "We don't have here a classic mail fraud scheme. We don't have a public official who is charged with having taken some improper corrupt payment." Judge Friendly distinguished the case, which your Honor just commented about, on that very ground. And that is why Dixon is controlling here.

Here we have not a word in the indictments, not a word of any corrupt payment to any legislator. We have only the allegation that payments were made to legislators which your Honor must presume then were simply the normal kinds of campaign contributions, and that those payments were not reported on the PDC filing of April 1 of '76. So when the government distinguishes, as it attempts to do in its answering Dixon, by saying, "Here we have a corrupt scheme," I submit that the government is saying that in a brief but the grand jury didn't charge it in an indictment.

I think I can't emphasize too strongly the proposition that there isn't any word in the indictment which can be construed to allege any corrupt payments to legislators. There simply is the charge that payments were made and they were not recorded.

Now, we pointed out to your Honor in our memorandum that as to the 1976 form,

the one on which the whole case hangs, there is also a significant absence of another allegation which was made as to earlier forms. In the indictment it is alleged as to earlier filings, which are beyond the period of the statute, that payments to legislators were intentionally omitted from those forms. And yet when your Honor reads the allegations of the paragraph that deals with April 1, 1976 filing, that allegation is conspicuously absent. So for another reason we have a filing which the government must rely on if it is to stay in court as to which it has not and cannot allege any omitted payments.

Since we made our motion, your Honor, we have received the affidavit of Mr. Harrigan to which is attached the grand jury testimony of Mr. Perry and it is significant, your Honor, that the session of the grand jury -- which, by the way,

occurred on January 22, 1981 -- appears to be one where a grand juror asked almost all the questions, and it appears to have troubled the grand juror that Mr. Perry hadn't been able to identify a single recipient of money from Mr. Buckley.

Your Honor will see in the transcript, which is attached to Mr. Harrigan's affidavit, that Perry over and over again was asked by grand jurors, or a grand juror, it's hard to tell which, who got the money, and he kept saying that was none of his business, he didn't know, that wasn't his function, it was up to Mr. Buckley. So it is apparent from the Perry testimony now that the government has not alleged the intentional omission of payment to legislators from the April 1, 1976 PDC filing because there is no evidence that Mr. Buckley made any particular payments to legislators in 1975, which was the only year covered by the April 1, 1976 filing.

And it would appear that the government somehow hopes to take the case to trial on the theory that Buckley got money in previous years and maybe some of it was left in 1975 and maybe some of it in 1975 was paid to legislators, and if it was then this was all a scheme to violate the mail fraud statute. And I don't believe, your Honor, that that kind of speculation is permissible. I don't think it is permissible to even indict someone let alone take his case to the jury in a criminal trial and insist that because of it the receipt of earlier payments is shown.

THE COURT: Do you have any comment to make upon the bill of particulars filed for the government with respect to that?

MR. HELSELL: In the bill of particulars filed by the government the government was asked to specify the respects in which the 1976 PDC filing was false. And in

responding, without stating any particular payments which it claims should have been reported in it, it simply said that payments weren't reported in it. Now, I don't believe that is enough. It was incumbent upon the government at that point if it had evidence of specific payments by Mr. Buckley in 1975 made to legislators which were required by Washington law to be reported, to have named them in response to your Honor's specific order that it specify those things if it could. So in that regard I think the government, and in that one sense I commend Mr. Ruark's candor, he wasn't going to say anything more in his bill of particulars than he could prove, but I don't think according to the Perry testimony he can prove any particular payment made by Mr. Buckley in 1975 to a legislator that was not reported in that statement. And your Honor will see because

it is attached to some of the pleadings that the statement itself reports payments to legislators.

THE COURT: During the previous year.

MR. HELSELL: During the previous year. That what the government must do is prove there was a payment to a legislator in that year that was not reported on that form. That is what I firmly believe the government is totally unable to do and was unable to respond to the bill of particulars in that connection.

Now, we cited in our preliminary memorandum, I believe it's the Russell case, which points out that an important function of the bill of particulars is to enable the Court to see whether the government can prove the case which it has alleged in the indictment. And of course, it follows that if the government can't prove the case that is lodged in the

indictment which here speaks in generalities about the April 1976 filing being in furtherance of the scheme, then the Court should dismiss the indictment for the inability of the government to prove a case which should go to the jury in connection with the charge which it makes.

And that is exactly the situation we have here. The government was asked by motion for a bill of particulars and ordered by your Honor to specify the respects, and that obviously means the particular respects in which the 1976 form was false. And it did nothing more than to say payments received by Buckley and distributed by Buckley were not reported in that form.

Well, we can concede payments made in 1973 weren't reported in that form. So we are not overly concerned about what happened in 1975 and what can the government prove Buckley did with the money in 1975.

And if it can't prove what he did with the money in 1975 then this case should not proceed to trial.

THE COURT: All right. Would you care to say anything further?

MR. HELSELL: No, I think that completes it.

THE COURT: Do any of the other attorneys for the Defendants wish to address this issue?

MR. HARRIGAN: I would like to, your Honor.

THE COURT: For the Reporter would you state your name?

MR. HARRIGAN: Arthur Harrigan, representing Washington Water Power.

Your Honor, the indictment begins with paragraphs 1a, b, and c, and which purport to set out three purposes of schemes which are then going to be tied into the mail fraud statute. The first two of those, however, are not supported subsequently by

any statements of fact. The first one is essentially that the scheme was one to deprive citizens of the loyal and faithful services of the legislature free from corruption, bias and dishonesty. That is the last there is in the indictment, however, on that subject. There is no fact alleged which could possibly constitute corruption, bias or dishonesty on the part of the legislator. All that subsequently is alleged is a circuitous method of making political contributions with the idea of avoiding Initiative 276 and its disclosure requirements.

The second paragraph, 1(b), says that the purpose of the scheme in part was to defraud citizens of their right to have electoral processes free from corruption, bias and dishonesty. Again, there isn't another word in the indictment about the electoral processes or suggesting that

there was any bias, corruption or dishonesty in them. What is alleged in this indictment is a circuitous method by which Washington Water Power is said to have gotten money back to itself presumably -- or not presumably but according to the indictment -- with the idea that it would then be difficult to show that the money had originated with Washington Water Power so the company could successfully conceal these political contributions. That is all that is actually alleged.

THE COURT: Don't they say in (c), "to defraud the citizens of the right to know of any benefits and actions otherwise given to the legislators," -- that is, by the filing of false forms?

MR. HARRIGAN: That's correct. And I agree that the third paragraph of paragraph 1, that is 1(c), is the one that alleges the only scheme that the government then in the indictment fleshes out with any facts

at all and it says that it is to defraud the citizens of their right to know. So that is the one we have to examine. And the government cannot rely upon 1(a) or 1(b) because the indictment does nothing further with either one of them.

So we are not talking about a case of corruption of public officials. The basic point I am trying to make here, we are talking about a case where the government alleges a scheme to violate the public disclosure act is what it boils down to because the public's right to know, of which the government says it was defrauded, arises only by reason of the public disclosure act. Prior to that act there was no right to know and therefore there couldn't be a defrauding of such a right to know.

So what this indictment boils down to is this allegation that there was a scheme to violate Initiative 276. That is what it

boils down to. And when you look at this indictment in that light, your Honor, what it amounts to is an effort to stretch the federal mail fraud statute to this, not just to a violation of state law but to a non-violation of state law because this indictment doesn't anywhere allege that anyone filed a false public disclosure statement within at least the applicable statute of limitations period for the mail fraud statute.

THE COURT: It does allege, does it not, the filing of false forms?

MR. HARRIGAN: It alleges the filing of false forms in the years 1973 and 1974 and if I'm not mistaken, 1975, none of which would, even if the mails were used, obviously allege a federal offense.

THE COURT: Because of the statute?

MR. HARRIGAN: Because of the statute. So the only paragraph of the indictment which purports to allege any offense

wouldn't support a claim of violating Initiative 276 because that paragraph which speaks with regard to the 1976 statement is unique in omitting the allegation that that form was false.

Now, the fact is, your Honor, that although the indictment purports to state that there were false statements filed in previous years, as a matter of law that isn't the case, and it may not be vitally important.

THE COURT: Why do you say that?

MR. HARRIGAN: I say it, your Honor, because what the indictment says is that Mr. Buckley began filing these statements in January of 1973 with the Public Disclosure Commission. Let me back up. What it says is that he received two payments from Mr. Perry both in 1973, one in May and one in mid-December, and that thereafter he distributed that money to legislators and

that thereafter in 1973, 1974 and 1975 those payments to legislators were omitted from the form.

Well, the fact is that as a matter of law, your Honor, there was no public disclosure act in force in 1973.

THE COURT: What about 1974 and 5?

MR. HARRIGAN: There was starting on February 5, 1974, your Honor, but there is no allegation in the indictment that any money was paid to any legislator in 1974 or 1975. All that is alleged is that money was received in 1973 by Buckley and was thereafter distributed to legislators. It is perfectly consistent with the indictment that all that money was distributed in 1973. In fact, if one makes the assumption that the government would like the jury to make in this case that Mr. Buckley wanted to avoid disclosure. obviously, given the fact that he gets the last 1973 payment in December he has two months in which to get

rid of that money before there even is a public disclosure requirement. So if he had the motive that the government would ascribe to him he would have obviously have distributed that money before he was under any legal obligation to disclose it. So those are the two 1973 payments that are alleged.

There is only one left and that is 1975.

THE COURT: In 1973 was there a ten thousand and a fifteen thousand?

MR. HARRIGAN: The claim is ten thousand and thirteen five, as I recall.

THE COURT: Because of the payment to Sam Lee?

MR. HARRIGAN: That is the way I recall it. And so, your Honor, the reason I say that as a matter of law there was no violation of any public disclosure act in 1973, 4 or 5 is that --

THE COURT: When did the initiative go into effect?

MR. HARRIGAN: February 5, 1974. (Continuing) -- is that there were only two payments prior to the one in 1975 alleged and for all that appears from the indictment both of them would have been distributed before there was any public disclosure act.

THE COURT: Or they could have been?

MR. HARRIGAN: Could have been. Now, that leaves us with 1975. Now, obviously, the only public disclosure act filing that we are concerned with with regard to that fifteen thousand dollars alleged payment to Buckley is the public disclosure filing of April 1976 and the other reason that is the only one we are concerned with is that it is the only one within the statute of limitations anyway. And as to that one the government was required by the bill of particulars to state which payment, if any,

was omitted from that form. And the response was, in effect, "We don't know." I would like to read exactly what the government responded. This was the question --

THE COURT: I have read that myself, but you read it.

MR. HARRIGAN: The question is, "Which payments, if any, were omitted from the Form L-3 for the year 1975?" and the answer was, "The L-3 filed by Washington Water Power for the year 1975 failed to report any of the money received from Robert A. Perry and spent on behalf of Washington Water Power by Jeremiah Buckley."

Well, your Honor, when asked to say which payments were omitted an answer that says, "They failed to report any of the money" does not answer the question other than to say, "We don't know," because if there were an allegation in the indictment,

or even inferred from the indictment that the money had been paid in 1975 it would be possible to state something other than "any of the money." "Any of the money" just asks the jury to speculate that maybe some of the 1973 money was left over and was paid out in 1975 or maybe the 1975 money was paid out in 1975. But the only thing the government actually alleges or the indictment actually alleges about the 1975 money is "thereafter" it was distributed to legislators. Well, "thereafter" includes any year after the date that the money was allegedly received in May or June of 1975. And if it was after December 31 there is no requirement that it be disclosed in that disclosure statement.

Now, why does that matter? If we were dealing here with a claim that Initiative 276 had been violated obviously this indictment would have to be thrown out because there is no allegation that any

payment was made that had to be disclosed in that statement. If we were dealing with Initiative 276 prosecution and the allegation was money was received in 1975 and at some later time was distributed to legislators and a filing was made in 1976, that charge wouldn't get to first base because unless there is proof of payment made in 1975 covered by that statement there is no allegation of a violation. So what the government wants to do is take a non-violation of state law, facts which couldn't even constitute a violation of state law, and make them into a violation of the mail fraud statute by doing what? By baldly asserting the statutory language that the mailing was in execution of a scheme. And then by citing some cases that say if we charge you in the statutory language that the mailing was in execution of the scheme we don't have to prove that the mailing itself was false, nor are we prevented from

going to trial as long as we have quoted the statutory language in the indictment.

And neither of those assertions is accurate when applied to this particular case because this is a scheme whose whole alleged purpose is to avoid disclosing payments to legislators. The only way in which a mailing of a disclosure statement could have any connection with such a scheme would be if it were false. And there is no possible way in which mailing a true disclosure statement can be in execution of a scheme to hide payments.

So the cases that say that the mailing itself need not be false under the mail fraud statute just don't have anything to do with this case. Those deal with situations where the party is out defrauding somebody and that part is alleged in the indictment: that he has misrepresented thus and so to Mrs. McGillicuddy and she gave him money and he mailed it to his

brother. There is no allegation that anybody is being defrauded here, which is the other basis of our motion to dismiss.

But this basis is even more fundamental than that, your Honor, and that is that the government has to show that the mailing was in execution of the scheme even if it is a scheme to defraud. And mailing a true statement cannot be in execution of a scheme to mail false statements, which is what this question boils down to. So this is one of those cases where it appears from the face of the indictment that there is no connection between the mailing and the alleged scheme. And on that basis alone this indictment should be dismissed, particularly when you bear in mind that the government, the whole thrust of this, is to try to create a federal violation where there isn't even a state violation alleged. A federal violation, I should say, out of

the state statute where there isn't even an alleged violation of the state statute.

Now, the government relies fairly heavily in its reply brief on a case called Hanling vs. United States, 418 U.S. 87. It quotes this language: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself. As long as those words of themselves fully, directly and expressly --"

THE COURT: I think we are beyond that though because the motion of the Defendants asking the bill of particulars specified the information that they wanted and I ordered that that information be given. So irrespective of the cases saying an indictment is sufficient, in this case I don't think it is.

MR. HARRIGAN: I think it is relevant too, though, if I may, that in that Hanling case the Court reached the same conclusion that this Court did in ordering that the

bill of particulars be provided, and that was that here this crucial issue of the connection between the mailing and the scheme is a basic factual question. It's the guts of this whole case and if the government can't identify that connection then there is no offense alleged. And it really boils down to whether we are talking about a factual question that is basic to the case or, as in Hanling, a question of law where the Court said that the definition of obscenity, which was what was being attacked, was a legal matter, not a factual matter, and where that is the case the indictment can use just the statutory language.

Here the government is required to specify the connection and it cannot do it. And the reason it can't do it is that the grand jury was apparently unwilling to state in the indictment that that L-3 was false because no one had testified that it was.

Now, the alternate basis of the motion is that this is not a scheme to defraud. Even if the L-3 were palpably false and it was so alleged, what we have here is no more than an allegation that there was a scheme to avoid disclosing otherwise perfectly legitimate political contributions. Now, the allegation regarding the Day Crew contracts and the additional funds that are supposed to be flowing to Sargent-Tyee and what have you, when you look at it in the light of what is ultimately charged, that it is mail fraud, there is nothing more than a complicated way for Washington Water Power to return money to itself. Once Mr. Perry, as is alleged, hands the money to Mr. Buckley, all we have is what we had to begin with, namely, a sum of money in the hands of Washington Water Power. And the question then becomes What did they do with it? And as far as the indictment alleges, all they

did with it was to pay it to legislators just like they pay other political contributions to legislators. But according to the indictment --

THE COURT: Well, the gravamen of the indictment, however, is the failure to disclose that to the commission.

MR. HARRIGAN: That's true, your Honor.

THE COURT: If the payments made had been legal but they failed to disclose them. And in that connection I would be inclined to think if the form which was filed in 1976 was false that definitely is important.

MR. HARRIGAN: I think the form was not false. And of course, these are two totally independent grounds but I would disagree with your Honor to this extent. There was no question in the Dixon case that the forms filed with the SEC were false. Judge Friendly, in fact, said there

was "an intention to deceive." There wasn't any question about that. And there wasn't any question that it was done with the idea of hiding the loans.

THE COURT: My impression is that the Ninth Circuit cases are more liberal than that Second Circuit case. Isn't that true?

MR. HARRIGAN: Well, your Honor, I think the Dixon case is the only one we found that parallels our situation and what I am suggesting is that all of the cases that deal with this hazy area of corruption of public officials involves some act of bribery or corruption. That is, where the actual payment of the money is wrongful.

THE COURT: Well, my feeling there though would be that, say, if you assume the form which was filed in 1976 was a false one in that it did not disclose payments to legislators even though the payments to legislators may have been

perfectly legal, that there would be a scheme to defraud the general public by failing to disclose that which the public had ordered to be disclosed by Initiative 276.

MR. HARRIGAN: Well, your Honor, all I can say in response to that is I believe that the facts of the cases that would support that viewpoint don't go that far. And in those cases there is always an element of the public official being influenced wrongfully by the payment of money. And actually, as the Dixon case describes all those cases, essentially the same ones cited by the government, it describes in this way -- "This doctrine of the deprivation of honest and faithful services has developed to fit the situation in which the public official avails himself of his public position to enhance his private advantage often by taking bribes or where a public official is paid to act in a

breach of his duties." And in a general statement about those cases Judge Friendly says, "All of these cases, however, involved an element of corruption not present here."

And what I am saying is that in handing the money to the legislator you are not doing any different from any other political contribution. The wrong part is not disclosing it and that may be a violation of the public disclosure act but it is not fraud.

Thank you, your Honor.

THE COURT: Anything else from any counsel for Defendants?

(Brief pause)

THE COURT: Apparently not. Mr. Ruark?

MR. RUARK: Thank you, your Honor. I would like to begin my remarks by focusing in on exactly what we are talking about here and that is the sufficiency of this indictment.

THE COURT: The sufficiency of the indictment coupled with the bill of particulars.

MR. RUARK: Coupled with the bill of particulars. Because I understand the law, your Honor, and the government is not arguing the bill of particulars. We will correct or remedy an insufficient indictment. We are talking about whether or not this indictment is sufficient in charging the offense. And in that regard it is important to remember and keep in mind that at this stage of the proceedings we are talking about that the allegations in the indictment are presumed to be true.

THE COURT: We are and we are not. The Court has ordered certain disclosure in the bill of particulars and I don't want to dismiss this count of indictment. That is really not my function. But if it should be I am going to. What I don't want to do is to have a visiting judge come in here

and try this thing for two or three or four weeks and then he be compelled to grant a motion for judgment of acquittal because there just is no proof that the form filed in 1976 was a false form.

MR. RUARK: All right. I would like to address that for a moment, your Honor. What I am trying to get at here is the standard we are dealing with in this hearing is whether or not the Court is going to presume the allegations as they are set forth in the indictment for purposes of this motion are true. I believe that is the standard when such motions are before the Court.

The indictment alleges, just the indictment without going into the bill of particulars now, alleges a scheme to defraud and corrupt public officials in the performance of their public duties. A scheme to corrupt the electoral processes in the state of Washington and a scheme to

deprive the public of its right to know of the relationship, financial responsibility, between legislators and Washington Water Power. It goes on to allege further the mechanics of that scheme and how it was carried out, setting up a laundry operation so money could be laundered from Washington Water Power through Sargent-Tyee to Mr. Sam Lee and back to Vancouver and returned to a representative of Washington Water Power, Mr. Buckley. The indictment then alleges that payments were made to legislators who were unknown at the time the indictment was returned. And finally the indictment --

THE COURT: Is that illegal? Paying legislators? Making contributions to legislators?

MR. RUARK: It would be illegal if it could be denominated a fraud, yes.

THE COURT: You don't have any evidence on that?

MR. RUARK: We have not used the word "bribe" because we do not know any particular legislators who have received any payments.

THE COURT: So what you are really going on, is it not, is the failure to disclose the payments?

MR. RUARK: I think that they are very closely interrelated, your Honor. It seems to me there is no reason in the world not to disclose these payments if they are for a legitimate purpose. And you can draw reasonable inferences from the activities as alleged in the indictment. And our point is that the only reason that you can come up with to make these payments under the table at a time when there is a disclosure requirement in effect is to affect the judgment decision of a legislator on particular issues.

If that is the case then it is a corruption of the political system and in effect would be a bribe although bribe

under State of Washington law has a much more general meaning and does not just involve the cash payments, as it were.

And then finally you have in the indictment an allegation of a mailing, particular mailing in 1976 in execution of this overall scheme to hide the existence of this money and the payment of this money to legislators.

THE COURT: Of course, it is not to hide the existence of the money because I don't think the form requires that, that disclosure. It is the payment. Isn't that true?

MR. RUARK: Yes, in terms of the legal consequences. I am talking about the fact that there was a pool of money available. The Water Power Company didn't want that known either. But in terms of legal consequences it is the payment of money, obviously. And I suggest to the Court that the motion to dismiss at this point based

upon insufficiency of the indictment is semantics at the very best. The indictment should be taken as a whole, and I cannot conceive of reading this indictment without a clear understanding that the mailing in 1976 was false.

THE COURT: Well, you may be right on the indictment but when the motion came in for a bill of particulars they asked for a great deal of details about this particular form and I ordered that disclosure and apparently you did disclose all that you knew.

MR. RUARK: That's correct.

THE COURT: So I gather that you do not know and have no facts to prove that that particular return was false.

MR. RUARK: I disagree with that.

THE COURT: You didn't disclose it.

MR. RUARK: I cannot give specifics in which way or fashion the form is false. In other words, I can't say specifically that

legislator X received X amount of money at a particular time.

THE COURT: Do you have any evidence that Buckley paid out any of that money in 1975?

MR. RUARK: We have circumstantial evidence that would indicate that Buckley made payments in 1975.

THE COURT: Don't you think that my order required the disclosure of that?

MR. RUARK: I didn't understand your order to do that, your Honor. I understood your order to be related to the form itself and in what fashion it indicated a falsehood.

(Brief pause)

THE COURT: Well, the paragraph -- I guess there were two paragraphs pertaining to paragraph 28 and I think that is the one we are talking about. And paragraph 14 of the motion. Let me just see if I didn't order 14 and 15.

(Brief pause)

THE COURT: Well, paragraph 14 of the motion was -- am I correct it was paragraph 28 that we are talking about? -- by stating as to paragraph 28 how it is contended the mailing of public disclosure commission form L-3 for the years 1975 related to the scheme of artifice described in paragraph 1-a, 1-b and 10c, answering separately as to each such paragraph. And paragraph 15 of the motion is "by stating as to paragraph 28 which payments or expenditures, if any, were omitted from the form L-3 for the year 1975 and by identifying any other statements contained in said form which it is contended were untrue and the respect in which it is contended they were untrue and by stating whether it is contended that any required information was omitted from said form, and if so, by identifying all such information."

And the bill of particulars which you filed just didn't do that at all.

MR. RUARK: Your Honor, may I ask you which -- I don't have your order, I just have the motion itself.

THE COURT: My order -- and I don't have it before me -- my order just said, "with respect to paragraph -- granted, denied, denied," and so forth. I'm positive that I granted the motion with respect to paragraph 15 and I think I did with respect to 14.

MR. RUARK: I am not disputing, your Honor, I just couldn't find the motion and I was trying to find out where you were.

THE COURT: The motion is dated February 1981.

MR. RUARK: I have it in front of me now.

THE COURT: Then the paragraphs are 14 and 15, and I am quite certain, although I don't have it before me, that I granted the

motion with respect to both of those paragraphs.

MR. RUARK: 14 and 15?

THE COURT: I think I did.

MR. RUARK: According to my notes on my copy of the motion 14 was denied and 15 was granted.

THE COURT: All right. Now, your response to the bill of particulars in paragraph 15 was, "The L-3 filed by Washington Water Power Company for the year 1975 failed to report any of the money received from Robert A. Perry." I don't think there is a requirement to report. I may be wrong.

MR. RUARK: There is not.

THE COURT: On receipt. Yes. (Continuing) -- and spent on behalf of Washington Water Power Corporation by Jeremiah Buckley." What I wanted you to do and what

the Court needs is to tell the Defendants what was paid out and what was not reported.

MR. RUARK: OK. And I think that my response answers to paragraph 15 -- I don't know if it answers 14 and I didn't understand we were required to answer 14 -- 15, as I understand it, says identifying any other statement. Basically we said we couldn't do that.

THE COURT: I think that's right. In effect you say you couldn't do it.

MR. RUARK: I understood that to answer the question.

THE COURT: Well -- and I gather that's the answer -- you can't do it.

MR. RUARK: Yes. Other than, well, maybe we ought to get back to what the question was before.

THE COURT: Well, it seems to me that before a jury could find one or more or all of the defendants liable here on this

scheme that they must find that the form filed in April of 1976, because that's the only one within the statute of limitations, was in some respects false.

MR. RUARK: I agree.

THE COURT: You alleged that it was false, isn't that true? The indictment charges that is false?

MR. RUARK: We alleged it was an execution in furtherance of the scheme and the scheme would have -- our position is, the allegation is that it was false.

THE COURT: But in furtherance of the scheme?

MR. RUARK: Yes.

THE COURT: Because it seems to me that a form which was true is simply not in furtherance of the scheme because that would mean if you had a conspiracy in the years 1972 to 1974 every form filed thereafter -- this year, next year, and so forth, would be in furtherance of the

scheme. I don't see how the government could prevail in a motion for judgment of acquittal if the only evidence the government has would just be an inference from the fact this had been done previously.

MR. RUARK: I'm not saying that is all we have.

THE COURT: I think there are one or two facts that you can take into consideration in arriving at a decision on a motion for judgment of acquittal. The fact that it was done in the past under the same scheme and under the same general idea. What evidence do you have?

MR. RUARK: All right. In addition to that we have comments --

THE COURT: In addition to what?

MR. RUARK: In addition to those two factors we have been talking about, the previous payments, the previous things Mr. Buckley admitted to making, admitted in 1973 the payments he had been making,

payments to legislators, which were not disclosed.

THE COURT: And for purposes of this motion I would accept the fact that prior forms were false? And I just assume that?

MR. RUARK: I don't remember if there were prior forms at that point.

THE COURT: I think forms were filed prior to April 1976, forms for prior years.

MR. RUARK: All right. And in addition to that we will have testimony from Mr. Perry that Mr. Buckley was putting a great deal of pressure on him during the 1975 legislative session relating to a bill called House Bill 435 which was an omnibus bill dealing with utilities in general and specifically Washington Water Power and other private utilities and how they could set their rates.

THE COURT: What kind of pressure was he putting on Perry?

MR. RUARK: He wanted the money. The money hadn't come through. This scheme was supposed to be going on during a period of time 1972 through 1975, and ad infinitum if it was successful. And for reasons unrelated to Mr. Perry, or for that matter to the water power, Sargent-Tyee was not able to produce the money on a regular basis. One of the reasons was that at one point, I believe it was in the year 1974 and 1975, Sargent-Tyee could not expend any money without a counter signature of an official of the bank. So there is a period of time in 1973, December of 1973, I believe, through about until June or July of 1975. And the background of these payments was that Mr. Buckley had a close vote coming up on 435 and he was putting pressure on Mr. Perry to generate the money that was supposed to come out of this money washing

scheme that hadn't been made available before. Mr. Buckley specifically was alluding to House Bill 435, the necessity of getting that passed. Mr. Buckley or Mr. Perry arranged for a meeting with Sargent in Olympia. The meeting was had. Mr. Perry also called Sam Lee in Hong Kong and asked him to bring fifteen thousand dollars to the United States. Mr. Lee brought fifteen thousand dollars to the United States. He met Mr. Perry in late May of 1975. Mr. Perry took the money from Mr. Lee. He kept it until he gave it to Mr. Buckley.

THE COURT: When was that?

MR. RUARK: That would be either late May of 1975 or early June of 1975. Mr. Buckley reiterated that the money was going to be used for Mr. -- excuse me, for House Bill 435 and getting its passage. Except for, I think it was fifteen hundred dollars, which Mr. Buckley told Mr. Perry he

was going to keep for himself and he didn't want the water power company to know about that. Shortly thereafter House Bill 435 passed and it passed by one vote in the Senate of the State of Washington.

The government will also establish through the valuation of the 1976 form, the one with the charge, all the expenditures that are listed on that form and we will document them with expenditures or vouchers, receipts, from Washington Water Power records to show that they match up. In other words, everything that is reported Washington Water Power has a voucher for. There is no indication or no evidence whatsoever that the fifteen thousand dollars minus the fifteen hundred dollars was ever reported to the Public Disclosure Commission in any way, shape or form. The government's position is that evidence of that nature is sufficient to take the case to jury. And we don't need to specifically

isolate it. We are looking for having the bill come forward.

THE COURT: You know of no payment?

MR. RUARK: No direct individual payment, that's correct, your Honor. Mr. Perry has maintained, as Mr. Helsell read in the proceedings, that Mr. Buckley never did tell him specifically to whom money was going. Used for legal purposes relating to House Bill 435.

THE COURT: Why don't you go ahead? Do you have more?

MR. RUARK: I would rather respond to your questions because I think it would be more profitable. I don't want to reiterate what I have put into my written pleadings. I do think the scheme as alleged involves more than just a non-disclosure scheme Mr. Harrigan seems to think, and for that reason the Dixon case is not an appropriate precedent for this case. In Dixon there was no additional scheme to defraud. Here

you have that and the intangible rights doctrine under case law developed by the various circuits around the United States.

One of the problems, I suspect, one of the things that makes this case disconcerting for everybody is that normally a case like this would be focused in on the legislators themselves actually taking some money. Here you have a different situation. You have the scheme from the outside being developed to, in effect, corrupt legislators for specific purposes, and that is for the purpose of passing specific legislation in this case.

If the Court has no further questions I will conclude my remarks.

THE COURT: Well, the bill of particulars was certainly a proxylized response to the order of the Court.

MR. RUARK: I apologize, your Honor. I did not understand the order of the Court to go to that kind of material.

THE COURT: Any rebuttal argument?

MR. HELSELL: Yes, your Honor.

THE COURT: Let me tell you what I would like to have you address because the thing that still concerns me because it is absolutely critical is could the government go to the jury if they do prove the evidence that Mr. Ruark spoke about? That is that in the past money went to Buckley which he then paid out which he didn't report. But that in 1975 he got money. There was a critical bill at issue. He said he was going to use it for the purposes of making contributions.

MR. HELSELL I don't believe that Mr. Ruark told your Honor that Mr. Perry will testify that Buckley told him that he was going to use it for the purpose of making political contributions. I have become a student, I can assure you, of Mr. Perry's grand jury testimony.

THE COURT: What do you think Perry will say? From the grand jury?

MR. HELSELL: If Perry says no more in the trial than he said in the grand jury he will say that Mr. Buckley was given fifteen thousand dollars by him in the spring of 1975. But more remarkably, he will say that he thought it was coming from his money over in the Orient. And I can refer your Honor even though it requires going ouside the record, to page 52 of Mr. Perry's grand jury testimony in the first session where he was before the grand jury where a lady grand juror asked him, "Whose money was that that you gave to Mr. Buckley in May of 1975?" And Mr. Perry said -- or I could just read two questions and answers. Question: "That was his money then? He didn't have any compensation for that money like before when you gave him a check and --"

THE COURT: When she says "his" who is the "his"?

MR. HELSELL: Sam Lee.

THE COURT: Oh, Lee. Now would you read the answer?

MR. HELSELL: He says, "That was his money then?" meaning Sam Lee, "He didn't have any compensation for that money like before when you gave him a check and he would return cash less ten percent? This time he didn't receive any money? It was all from his pocket, this fifteen thousand dollars? His sources?" Answer: "I had some other money in the Orient at that time." Mr. Ruark. "She asked the question. Tell her." "I had what I was convicted for. I had other moneys in the Orient at that time. So I assumed that Mr. Lee took it out of the moneys I had."

THE COURT: Does that make any difference?

MR. HELSELL: It certainly does.

THE COURT: Why does it?

MR. HELSELL: The whole scheme here is alleged to have been a scheme to take Washington Water Power money and launder it through Sargent-Tyee and do that laundering so that it could be concealed on the public disclosure statement. But let me return to the question your Honor first asked.

Surely a criminal case can't go to the jury on the issue of whether a statement was false, as your Honor has correctly observed in Michelle DeVee in 1976 because the government can say or prove, "Look, earlier statements were false back in other earlier years so we can presume that there was some lie built into an April 1, 1976 statement even though we can't prove it." Now, certainly your Honor would not let this case go to the jury on that argument nor on the argument that Mr. Buckley was putting pressure on Mr. Perry to pay him

some money in the spring of 1975. It would be like sending somebody to jail, your Honor, for bank robbery by saying Well, he did it in '73 and so we presume he must have done it again in 1976. No criminal case could go to the jury on the speculative kind of evidence which Mr. Ruark has to concede is the only "circumstantial evidence" that the government has that certain specific legislators were paid in 1975 and that payments to those legislators were not recorded on the 1976 form L-3.

So I think your Honor should, because Judge Bilby hopefully will think as your Honor has indicated here you think, at the close of the case, the close of the government's case, and in the absence of any legislator getting a payment in 1975, Judge Bilby should, I submit, dismiss this indictment for the absolute failure of the government to prove any falsity in the 1976 L-3. And now that there is spread on the

record for your Honor both from the bill of particulars and from the government judicial admissions in this proceeding the fact that no such payments can be proven, your Honor should simply now dismiss this indictment because the government has conceded that it does not have an essential element of proof which would be required to take this case to the jury.

And it is not enough to simply allege in the language of the statute that the form filed in April of 1976 was in furtherance of the scheme. It couldn't be in furtherance of the scheme, as Mr. Harrigan has argued, if it was true. The government, therefore, must prove that it's false. The government cannot prove that it's false. It follows as night follows day that this indictment should be dismissed because the key factor is Was the 1976 form false? Something the government cannot prove.

THE COURT: Any other counsel want to speak?

MR. HARRIGAN: If I may, your Honor. Your Honor, the grand jury, the various members of it, repeatedly asked Mr. Perry the same question that your Honor asked Mr. Ruark and I believe one of numerous examples --

THE COURT: I saw your pleading and I looked over your affidavit hastily. Can you tell me when you filed the one in which you incorporated the grand jury?

MR. HARRIGAN: It was approximately ten days or two weeks ago.

THE COURT: Oh, yes. Here it is. Is it a supplemental affidavit?

MR. HARRIGAN: Yes, your Honor.

THE COURT: All right. Now, you go ahead.

MR. HARRIGAN: I believe attached to that affidavit is Mr. Perry's testimony of January 22, 1981, and on page 26 of that

testimony one of the many instances of this question being asked appears. A juror -- this is halfway down on line 14 -- says, "I think what he is asking is that the Washington Water Power Company was opposed to perhaps some bills that were going through the legislature or in the process of going through. Perhaps part of this question would be this money that you for a short period of time had control of and passed to Mr. Buckley. Was there any discussion as to who that would go to (inaudible) most favorable to the company that you represent?" Answer. "No."

Now, he goes on at length to explain that deals are compartmentalized. He doesn't know what happened to the money. That is the testimony, and the kind of testimony that the grand jury heard over and over. This whole excerpt consists of an attempt to get Mr. Perry to identify what happened to any of this money that he

says he paid over. And his answer repeatedly is that he doesn't know. Now, as a result, your Honor, the grand jury drew a distinction, because I would ask the Court to look at the indictment.

THE COURT: I know there is a difference in the indictment.

MR. HARRIGAN: Yes, as to the disclosure statement other than the one in question. It is specifically alleged that there was an intentional failure to disclose.

THE COURT: Point it out to me, would you please?

MR. HARRIGAN: Paragraph 26, line 25.

THE COURT: It says continuing through January of 1976 he did that.

MR. HARRIGAN: That's right, your Honor.

THE COURT: And after that.

MR. HARRIGAN: And then in paragraph 28, the one dealing with the L-3 form in

question, and the only one within the statute, there isn't a word about falsity or failure to disclose.

And so, your Honor, the grand jury when it handed down this indictment was unwilling to say that that form L-3 was false or that it failed to disclose anything because there hasn't been the testimony, circumstantial or otherwise, from which they could conclude that it was false. That is the only conceivable reason that that line is missing from paragraph 28. And what the government would like to do is to invite the jury to speculate that because they can prove someone received money in 1975 that he distributed it in 1975. And unless they can prove that he did -- well, I should say unless the indictment alleges that he did -- it doesn't allege a violation of the public disclosure act. It doesn't in the context of this indictment allege a connection

between the mailing of the form and a scheme not to disclose payments. And having Mr. Ruark recite what the circumstantial evidence may be simply -- I mean if a bill of particulars can't rescue an insufficient indictment, a recitation by Mr. Ruark in open court can't. And this indictment in paragraph 28 just does not allege that there was anything false in that form, and when asked to specify what was false in that form the government ducks the question and tries to say that it didn't disclose any of the money paid without saying that any was paid in 1975.

And so if, in fact, the government has circumstantial evidence that would justify the inference that this form was false they should go back and get another indictment. They should go and get one that says that because this indictment does not say it and the reason is that no one would testify that it happened.

THE COURT: All right.

MR. RUARK: Could I make a couple of remarks?

THE COURT: Certainly.

MR. RUARK: Answering the argument that the grand jury made a distinction in returning the indictment, I am sure the Court is aware that the grand jury does not draft the indictments.

THE COURT: Isn't it even more important that you drafted it?

MR. RUARK: Right. And we drafted in the standard form language which has been upheld time and time again and that is that the mailing we are referring to is in execution or in furtherance of the scheme. And as I have already said, and I will say one more time, the only way it could be in execution or furtherance is if it were false. There is nothing magical about the word false that renders an indictment valid or invalid. As a matter of fact, case law

indicates that there is no necessity to allege falsity in mailing. The only allegation that is required is the one required by the statute that says it is in execution or furtherance. You may fail in a trial in some cases because there is no showing that the mailing was in execution. In this case the government contends that it will show that the mailing was false based upon the evidence outlined.

But also I would like to correct a couple of things since people in this argument are speculating on what the grand jurors were doing and what they thought. I was there. They weren't concerned about the payments. They were concerned about Mr. Perry holding back and as to who might be getting the money. We spent a long time going over the individual questions as to who he thought was getting the money. As to that he could speculate. And at some point he did speculate as to some names but

he had no knowledge. No testimonial knowledge.

Finally, one thing Mr. Helsell raised, implying that the fifteen hundred dollars that came over was from Mr. Perry. A fair reading of that transcript indicates that Mr. Perry didn't realize at the time that it came from his funds if, in fact, it did. He still doesn't know; he is surmising. But it's also important to clarify the record that that payment was made, the exchange was made, in June of 1975, either late May or early June of 1975. The bank examiners were at Sargent-Tyee and running checks on the, or countersigning checks, until July of 1975 and about the first week of July. If memory serves me, and I'm not positive of this, but the day, the first business day, after the bank examiners left Sargent-Tyee a fifteen thousand dollar check was sent to Samuel Lee in Hong Kong.

So the money in any event did not come from Mr. Perry.

THE COURT: I don't really think that makes a whole lot of difference.

MR. RUARK: I wanted the record clear on that case.

THE COURT: All right. Well, this is a close question but I feel that I am just compelled to dismiss Count 1. My feeling is that in order for the jury to convict any one of these defendants on Count 1 the jury has to find that the form filed in 1976 was false in some respects. If it was, then I think my, at least preliminary feeling is that the government is in. But on a motion for judgment of acquittal at the end of the government's case the test is Would a reasonable jury have a reasonable doubt as to the facts which the government has to prove? And my feeling here would be that at the end of the government's case if it put on all of the

evidence which is included not only in the bill of particulars but I'm taking into consderation what you stated here in this courtroom, that if all that evidence was put in a reasonable jury would at the end of the government's case have a reasonable doubt as to whether the form was false. I am sure that a juror could speculate and say, "Well, it's probably false because others are false." But, on the other hand, there is no question about it that Buckley -- I am assuming that he did these things as charged before -- there is no question about it that he could have changed his mind in the year 1975 and just said, "I am not going to do it." Or for some reason or another the money just wasn't paid out to legislators in the year 1975.

Now, my feeling is that it is a lot better for me to rule that here because all of you have a long trial ahead of you and

my feeling is that the best thing here is to take it up to the Court of Appeals and see what they think about this particular ruling. If I'm wrong, and I may be, you can come back and try it. But if I am right it saves everybody a lot of expense.

Mr. Helsell, I am wondering whether you would draft up an order to reflect what I have said here? See if you can get an agreed order among counsel. If you cannot, present it to me and I'll maybe redraft it myself. At least I would like to have somehting in the record to reflect what I have said.

MR. HELSELL: Very well, your Honor. I think I can do it accurately. But let me ask your Honor about Count 2 that we have also moved to dismiss. Count 2 we have moved to dismiss, as your Honor knows, on the basis that the government concedes that all of the activities, at least of Washington Water Power and Mr. Buckley --

THE COURT: This is on venue?

MR. HELSELL: Yes. (Continuing) -- occurred in the Eastern District.

THE COURT: Are you serious about wanting to go to the Eastern District?

MR. HELSELL: No, I am serious about wanting to dismiss, which is what we are entitled to, in the Western District, and I submit your Honor should dismiss both Counts 1 and 2 on the basis of the venue argument that we made, and in our memorandum we cited to your Honor a total of five cases from five circuits, three of which we say require dismissal on that ground and two of which would go the other way saying that if the proceedings involved in the alleged obstruction of justice were in the Western District then it doesn't matter, the Defendants did everything in the Eastern District. But three of those cases support the motion that we make and I think that your Honor, if this matter is going to

go to the Court of Appeals, should dispose of that one too and let the whole question go to the Court of Appeals. Certainly we aren't asking for a Spokane trial.

THE COURT: That's what I was wondering. You don't want me to transfer venue?

MR. HELSELL: No, we don't. The reported cases think that dismissal is the correct approach. Dismissal should perhaps be included in this motion to dismiss because the acts were not committed in this district.

THE COURT: Well, on Count 2 I am disinclined to dismiss on the grounds that it is wrong venue. I know there is a split of authority but I think enough acts were done in this district to warrant its staying here. I gather that you don't really want a change of venue and try it over there?

MR. HELSELL: No.

THE COURT: If it's going to trial you would just as soon try it here?

MR. HELSELL: One complication this produces is if your honor dismisses Count 1 the government in theory can insist that we go to trial here on September 21 on Count 2 and then prove the whole Count 1 case to show why they say the activities that happened in Count 2 are supposed to have been an attempt to obstruct justice. I don't know what the government's contention will be but I certainly would violently object to having to listen to the whole Count 1 case as alleged support for Count 2 which is going to trial on that date.

THE COURT: All right. I am not going to dismiss Count 2 just to have both go up but I might ask the government, and I wouldn't ask you to commit yourself now, but would you be inclinded to hold off on Count 2 until we have a chance to appeal Count 1? You might think about it.

MR. RUARK: I'd like to think about it, your Honor.

THE COURT: I should let Judge Bilby know.

MR. HELSELL: Would your Honor like to fix a time when I can come back with an order which I will present first to Mr. Ruark?

THE COURT: Right. I am going to be gone the next few weeks so -- today is Wednesday. Friday afternoon would probably be the best time if you could.

MR. HELSELL: At two o'clock Friday?

THE COURT: That would be fine. Now, I know there are a lot of other motions, many of them with respect to discovery on Count 1. Where does that leave us with respect to the other motions?

MR. HELSELL: If, as I fear, the government chooses to proceed with trial on Count 2 on September 21 and if it argues that the Count 1 kind of evidence has some

kind of supporting background for the Count 2 charge then our need for the matters as to which we seek discovery here is just as great as it ever was. If the government, on the other hand, were to announce that it would defer trial on Count 2 until it would have reviewed Count 1 then our pressing need for discovery vanishes until we get closer to an ultimate trial some day on either of the counts.

I think if your Honor is going to defer the discovery ruling certainly the P-I should be advised that the evidence which we seek here must be preserved at all costs for a future ruling.

THE COURT: Oh, yes. I see Mr. Skates got off the mountain. So you have heard what Mr. Helsell asked and I would ask Mr. Utevsky and Mr. Skates to, of course, maintain all of those, I guess transcripts and tapes, I believe. Are those the things which are yet available?

MR. UTEVSKY: Certainly, your Honor.

THE COURT: Does any other counsel want to say anything to me?

MR. HARRIGAN: I would suggest, your Honor, that if we are going to defer argument on the discovery motions until Mr. Ruark has made his decision that we might set a date to make sure that all of that happens as expeditiously as possible because otherwise we are going to be awfully close to the trial before we get the material that the Court determines we are entitled to.

THE COURT: Yes. Well, Mr. Ruark, do you think you could make a decision perhaps in the next couple of days?

MR. RUARK: I can let them know, yes.

THE COURT: I will be gone on Monday. I'm planning to be gone the next two weeks which falls right in the middle of your preparation time. If it were possible let

me know by Friday of this week, sometime Friday of this week. Maybe I could schedule a day to come back during the two weeks period and hear you out.

MR. HELSELL: One thing that might solve the whole problem, I would be willing to stipulate that the discovery motions could be ruled upon by your Honor on the briefs without oral argument if the government could notify your Honor and us on Friday whether it intends to proceed on Count 2. If your Honor could rule on those matters before you leave our discovery wouldn't be impeded at all.

THE COURT: I am pretty much prepared to do that and if we had more time this afternoon I intended to hear you out and make a ruling. I think that is probably what I should do is to make a ruling before I leave Friday. Now, with respect to the P-I, what I was going to rule there, and I

made up my mind before coming here, was to ask the P-I to submit to me en camera transcripts of the tape. Do you want to speak to that, Mr. Utevsky?

(At this point a presentation was made by Mr. Utevsky which was recorded by the Reporter but not transcribed here.)

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No. 82-1459

In the Supreme Court of the United States

OCTOBER TERM, 1982

JEREMIAH P. BUCKLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order dismissing an indictment on the ground that it did not adequately charge the offense of mail fraud.

In January 1981, petitioners were charged in an indictment returned in the United States District Court for the Western District of Washington with mail fraud, in violation of 18 U.S.C. 1341. In brief, the indictment (Pet. App. D1-D19) charged that petitioners devised a money-washing scheme that operated from 1972 to 1976, in part to avoid a state law requiring disclosure of contributions to state legislators; that petitioner Buckley distributed money on behalf of petitioner Washington Water Power Company; that petitioner Buckley filed reports that intentionally failed to disclose the money paid to him which he subsequently distributed to members of the state legislature; and that the

petitioners, for the purpose of executing the scheme, "knowingly caused to be delivered by mail * * * an envelope addressed to the 'Public Disclosure Commission * * *' containing Public Disclosure Commission Form L-3 * * * " (Pet. App. D 19).

On August 21, 1981, the district court dismissed the mail fraud charge on the ground that the indictment and bill of particulars established that the government could not prove any falsity on Form L-3 because of the absence of explicit allegations that Buckley made payments to state legislators and intentionally omitted them from the Form L-3 (Pet. App. C1-C8). The court of appeals reversed. It concluded that the indictment was clear enough to give petitioners notice of the crime charged and to allow them to plead double jeopardy because it implicitly alleged the falsity of the disclosure report (Pet. App. A1-A28).

Petitioners contend (Pet. 9-24) that the indictment does not adequately charge a scheme to defraud because it does not explicitly allege that the mailing was false. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their conviction is affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking

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[1] It is now more than two years since the indictment was returned and more than a year and a half since the district court's dismissal order. Further interlocutory review at this time would cause serious additional delay in trial of the charges against petitioners.

review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1983

[2]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

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